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Military Voting and the Law: PRocedural and Technological Solutions to the Ballot Transit Problem

Cover Page Footnote

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MILITARY VOTING AND THE LAW: PROCEDURAL AND TECHNOLOGICAL SOLUTIONS TO THE BALLOT TRANSIT PROBLEM

R. Michael Alvarez, Thad E. Hall,** and Brian F. Roberts****

I. INTRODUCTION

It is axiomatic that members of the military, particularly those involved in conflict overseas, should be provided with the opportunity to exercise their franchise. Unfortunately, throughout history military personnel have been prevented from doing so due to both procedural and logistic hurdles, resulting in their franchise being effectively “hollow.” These difficulties came to the forefront of public awareness during the 2000 presidential election controversy in Florida when the ballots submitted by individuals living overseas—especially military voters—were seen as crucial to the election outcome as the margin of potential victory was so small that these ballots could turn the election from one candidate to the other.¹ Headlines at the time included: “Odds Against Gore Absentee Gains; Republican-Leaning Counties Appear to Have More Uncounted Overseas Ballots,”² “Bush’s Lead Swells with Overseas Votes,”³ “Military Ballot Review Is Urged,”⁴ and “Examining the Vote; How Bush Took Florida: Mining the Overseas Absentee Vote.”⁵

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1. See Dan Keating & John Mintz, *Odds Against Gore Absentee Gains; Republican-Leaning Counties Appear to Have More Uncounted Overseas Ballots*, WASH. POST, Nov. 16, 2000, at A26.

2. *Id.*

3. Susan Schmidt, *Bush’s Lead Swells with Overseas Votes*, WASH. POST, Nov. 18, 2000, at A1.

4. Susan Schmidt, *Military Ballot Review Is Urged*, WASH. POST, Nov. 21, 2000, at A1.

5. David Barstow & Don Van Natta, Jr., *Examining the Vote; How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at A1; see also Kosuke Imai & Gary King, *Did Illegally Counted Overseas Absentee Ballots Decide the 2000 U.S. Presidential Election?*, 2 PERSP. ON POL. 537, 537-49 (2004), available at

For many Americans, however, the controversy surrounding the votes of military personnel and overseas voters, despite its importance, may have seemed both bewildering and esoteric. The debate centered not on the rather uncontroversial proposition that military members living overseas should have the right to vote, but on minute details: whether certain overseas absentee ballots were valid, and could therefore be counted, if they lacked postmarks; whether ballots were properly received within statutorily defined time periods; and whether ballots were legitimate if missing a signature or lacking other statutorily defined characteristics.⁶ Such matters are likely beyond the interest of the typical American.

Despite the apparent focus on minutia, these legal skirmishes fought within the broader context of the recount battle impacted substantive issues concerning whether military absentee ballots could be counted, the resolution of which swayed the outcome of the 2000 presidential election.⁷ Issues of equal protection, federalism, and statutory interpretation played important roles in this litigation and highlighted not only the plight of military voters in exercising their right to vote but also the delicate, and often times difficult, balance between federal and state election laws.⁸ The tension between allowing overseas votes to be counted, as required by federal law, and ensuring a fair election that complied with state law was at the heart of the debate and related litigation.⁹

This tension is not new and, as it relates to military voting, has centered for years on the laws and procedures that individuals are required to follow before they can vote.¹⁰ The often competing federal and state statutory frameworks put in place to govern voting are critically important because they ultimately determine who can vote, in what manner they can vote, and the requirements that such votes must meet in order to be counted.¹¹ In the past, many states used hurdles, such as poll taxes, reading tests, and flat-out intimidation to systematically exclude minorities and the poor from

http://journals.cambridge.org/download.php?file=%2FPPS%2FPPS2_03%2FS1537592704040332a.pdf&code=601ede18746350f03592b187924f0996.

6. See Barstow & Van Natta, *supra* note 5.

7. See *id.*; see also Harris v. Fla. Elections Canvassing Comm'n, 122 F. Supp. 2d 1317, 1321 (N.D. Fla. 2000), *aff'd*, 235 F.3d 578 (11th Cir. 2000); Bush v. Hillsborough County Canvassing Bd., 123 F. Supp. 2d 1305, 1306 (N.D. Fla. 2000). For a discussion of these cases, see *infra* notes 254-56 and accompanying text.

8. See *infra* Part III.

9. See *infra* Part III.

10. See *infra* Part IV.

11. See *infra* Parts III & IV.

voting.¹² Such “procedural limitations” were implemented to make it more difficult, if not impossible, for targeted populations to vote even when they were serving their country in the military.¹³ Allowing more military personnel to vote and attempts at governing the mechanisms for doing so at the federal level came into conflict with the right of states to determine how elections were conducted in the states.¹⁴ More recently, however, the effective expansion of voting rights in America overall, and granting the right to vote to those eighteen years and older in particular, have removed many of these improper procedural limitations and significantly broadened the pool of potential voters, particularly among those in the military.¹⁵

One difficulty in expanding the pool of potential voters is the added burden of dealing with a voting population that is spread across the globe in highly inaccessible areas.¹⁶ Such “logistical challenges” necessitated new rules to facilitate voting for those in the military living overseas.¹⁷ Indeed, logistical challenges related to military voting have moved to the forefront and various laws now seek to provide pragmatic solutions to logistical military voting problems.¹⁸ As seen in both 2000 and 2004, however, these

12. See generally V.O. KEY, JR. WITH ALEXANDER HEARD, *SOUTHERN POLITICS IN STATE AND NATION* (1949); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910* (1974).

13. See, e.g., *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* (Peter D. Feaver & Richard H. Kohn eds., 2001).

14. See *infra* Part III.

15. While the Department of Defense does not provide specific information on how many of its active duty members are eligible voters between the ages of 18 and 20, demographic information for fiscal year 2004 indicates that 112,128 active duty enlisted members are between 17 and 19 years old and 461,930 are between the ages of 20 and 24. See OFFICE OF THE UNDER SEC’Y OF DEF., PERSONNEL AND READINESS, DEP’T OF DEF., *POPULATION REPRESENTATION IN THE MILITARY SERVICES* app. B, at tbl.B-22 (2004), available at <http://www.dod.mil/prhome/poprep2004/download/2004appendices.pdf>. In 2004, 69.7% of new recruits were between the ages of 17-20 with 122,670 joining the active duty military. See *id.* app. B, at tbl.B-1. There were an additional 89,323 members of the reserve military in 2004 aged 17-20. *Id.* app. C, at tbl.C-16. Previously disenfranchised minority voters also make up a significant percentage of the military, with African-Americans comprising 20.56% of active duty enlisted personnel in 2004 with 243,486 members, plus an additional 18,286 officers. See *id.* app. B, at tbls.B-24, B-38.

16. Not only does this include members of the armed forces who might be serving in remote regions of Iraq or Afghanistan, but it also includes those who are at sea (for example in submarines) or those whose precise whereabouts might be considered classified for security purposes.

17. See *infra* Part IV.

18. See *infra* Part V.

pragmatic solutions have not been a panacea and logistical difficulties remain. If such problems are not addressed, the ability of military members to have an effective franchise will be just as “hollow” as it was when procedures intentionally kept military members from voting.¹⁹ To address such problems, the federal government must either attempt a similarly wide-ranging effort as it did during the civil rights era including the potential for completely federalizing the process, a daunting task requiring both resources and political capital, or find a less interventionist solution that still facilitates military voting to a higher degree than is currently available.²⁰

The most promising means of accomplishing the goal of facilitating military voting without such a large undertaking is using technology to overcome the logistical problems in overseas voting.²¹ Increased access to and use of technology have provided an opportunity to address such problems while still maintaining the federalist system of election laws.²² Technology may ultimately be the means of resolving this tension and ensuring that not only do military voters have the ability to exercise their constitutionally guaranteed right to vote, but states can ensure fair elections that comply with their individualized election laws. Thus, in many ways, military voting may need to become part of the e-government revolution, with technology used to address bureaucratic and logistic failures while still maintaining acceptable governmental systems.²³ Such technological solutions, however, are not universally accepted and have not yet solved all of the potential issues with military voting.²⁴

In this Article, we examine how the issue of military voting has changed over time from one beset by procedural difficulties, often intentional with states changing election laws to promote military voting only within a given set of parameters and to restrict voting by those deemed unworthy of the franchise, to a logistical and technological issue that focuses on how new technologies can fully facilitate military voting. Part II of this Article will briefly outline the scope of the military and overseas voting issue. Part III will outline and address the conflicting statutory frameworks between federal and state election laws. Part IV will discuss the history of

19. *See infra* Part IV.

20. *See infra* Parts V & VI.

21. *See infra* Parts V & VI.

22. *See infra* Parts V & VI.

23. JANE E. FOUNTAIN, BUILDING THE VIRTUAL STATE: INFORMATION TECHNOLOGY AND INSTITUTIONAL CHANGE 44-64 (2001).

24. *See infra* Part VI.

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military voting from the beginning of America to the most recent conflicts. Part V will analyze recent problems and legal disputes arising from the logistical problems associated with military voting and local election laws. Part VI will discuss recent attempts to use technology to solve these problems with varying levels of success. Finally, Part VII will discuss the lessons learned from these attempts and look to the future of military and overseas voting in light of the upcoming 2008 presidential election.

We argue that major wars have spurred changes in the election process and that, after universal military suffrage was achieved, the federal role in military voting has moved to the forefront. Furthermore, such actions by the federal government create the possibility that centralized and concerted efforts to facilitate military voting may ultimately prove to be the solution to the logistical problems still affecting the process. We note, however, that such laws have a fundamental problem: these efforts to promote military voting still require the acquiescence and participation of the state and local governments who run the elections, whose cooperation is not always forthcoming. We assert that, while federal statutory schemes and enforcement are steps in the right direction, they may ultimately be just as “hollow” as previous attempts to facilitate military voting because of the need for multiple state and local entities to change their election laws. Finally, we argue that technological solutions, particularly centralized and uniform efforts, are likely the best means of both ensuring that military voting rights are substantively upheld while still maintaining the multi-layered election system based primarily on state law. The alternative is a complete federalization of the electoral process, something that Congress has been historically unwilling to contemplate.

II. THE SCOPE OF THE ISSUE

Estimates indicate that there are between six and seven million Americans who are overseas, in the Armed Forces, or dependents of Armed Forces members residing abroad.²⁵ These American citizens include soldiers stationed in places such as Iraq and Afghanistan, who are currently fighting the war against terrorism; missionaries working in remote regions of the world; younger

25. Derek B. Stewart, Dir., Def. Capabilities and Mgmt., Testimony Before Committee on Armed Services, U.S. Senate, *in* U.S. GEN. ACCOUNTABILITY OFFICE, REPORT NO. GAO-06-1134T, ELECTIONS: DOD EXPANDS VOTING ASSISTANCE TO MILITARY ABSENTEE VOTERS, BUT CHALLENGES REMAIN 1 (2006), *available at* <http://www.gao.gov/new.items/d061134t.pdf>.

Americans studying abroad; and Americans who work overseas, building economic opportunities in the global economy.²⁶ Each of these populations present their own challenges for voting officials, but military voters are often the most difficult to reach because of the logistical problems associated with sending ballots to mobile individuals operating in potentially inaccessible and hostile areas. The U.S. Congress has passed various statutes for decades in an attempt to facilitate the process for overseas and military voting²⁷ including the Soldier's Vote Act of 1942,²⁸ the Federal Voting Assistance Act of 1955,²⁹ the Overseas Citizens Voting Rights Act of 1975,³⁰ and the currently operating law that superseded them all, the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").³¹ Such attempts have met with varying levels of success in making it easier for overseas and military voters to vote in state-run elections.³²

Although a few scholars have argued that military voters have no problem voting,³³ data from numerous studies and analyses conducted since the 2000 election show that civilians living overseas and personnel in the uniformed services have a difficult time participating in the electoral process using the current paper-based absentee voting system.³⁴ In an examination of absentee voting in California, researchers found that UOCAVA voters were roughly

26. See, e.g., Americans Abroad: People & Groups, <http://www.anamericanabroad.com/demographics.html> (last visited Apr. 9, 2007).

27. See KEVIN J. COLEMAN, THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT: BACKGROUND AND ISSUES, CONG. RESEARCH SERV. REPORT NO. RS20764 1 (2003, last updated 2006), available at http://digital.library.unt.edu/govdocs/crs//data/2003/upl-meta-crs-4399/RS20764_2003Jan30.pdf?PHPSESSID=98075b5ea230a9383d3d830cbef0bb98.

28. *Id.*; see also Soldier's Vote Act (Armed Forces Absentee Voting Act), ch. 561, 56 Stat. 753 (1942) (repealed 1955).

29. See COLEMAN, *supra* note 27, at 1; see also Federal Voting Assistance Act of 1955, ch. 656, 69 Stat. 584 (repealed 1986).

30. See COLEMAN, *supra* note 27, at 1; see also Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 (1976) (repealed 1986).

31. See COLEMAN, *supra* note 27, at 1; see also Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (codified as amended in scattered sections of 42 U.S.C., 39 U.S.C., 18 U.S.C.).

32. See *infra* Part IV.

33. See, e.g., Diane H. Mazur, *The Bullying of America: A Cautionary Tale About Military Voting and Civil-Military Relations*, 4 ELECTION L.J. 105 (2005) (arguing that claims of difficulty in military voting were created by the Bush legal team to support arguments in favor of counting ineligible military ballots).

34. See, e.g., R. Michael Alvarez, Thad E. Hall & Betsy Sinclair, *Whose Absentee Votes Are Counted: The Variety and Use of Absentee Ballots in California* 1-3 (Caltech/MIT Voting Technology Project, Working Paper No. 34, 2005), available at http://vote.caltech.edu/media/documents/wps/vtp_wp34.pdf.

two times more likely to not return a requested absentee ballot and approximately three times more likely to have that ballot challenged when compared to non-UOCAVA voters.³⁵

This problem is not new. In 1942, 137,686 applications for federal “war ballots” were received, but only 28,051 of these ballots were cast in the election.³⁶ Contemporary accounts indicate that few military personnel voted using conventional state absentee voting procedures during World War II when personnel were dispersed all over the world.³⁷ The low response rate in 1942 was due to several factors that still present problems today. The main factor is simply the speed at which a paper ballot can be created, mailed to an overseas voter, filled out, and mailed back.³⁸ Such time scales are not conducive to some states’ regulations about when voting materials become available, as a result of administrative processes or simply the schedule between primaries and general election, or the date by which they must be returned to an election official to be considered valid.

For example, the deadline for registering as a UOCAVA voter ranges from thirty days prior to an election in twenty-one states to absolutely no registration requirement in fifteen states.³⁹ Similarly, ballots have to be received prior to Election Day in several states, but can be received even after Election Day in fifteen states.⁴⁰ This variation can easily create confusion among overseas and military voters and impact the very ability of these voters to receive their ballots in time to return them for tabulation.⁴¹ According to the Department of Defense’s (“DoD”) most recent survey of military and overseas voters, almost one-third of all military personnel and twenty percent of non-federally employed overseas civilians that did not vote in the 2000 election reported that they did not cast ballots because either they did not receive the ballot they re-

35. *See id.*

36. Boyd A. Martin, *The Service Vote in the Elections of 1944*, 39 AM. POL. SCI. REV. 720, 725 (1945).

37. *Id.* at 725-26.

38. *See id.* at 726.

39. *See* David M. Walker, Comptroller Gen. of the U.S., Testimony Before the Subcommittee on Military Personnel, Committee on Armed Services, U.S. House of Representatives, in U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-01-704T, ELECTIONS: ISSUES AFFECTING MILITARY AND OVERSEAS ABSENTEE VOTERS 10 (2001), available at <http://www.gao.gov/new.items/d01704t.pdf> (discussing state registration deadline requirements).

40. *See id.* (discussing variation among states concerning deadlines for receipt of overseas ballots and resulting confusion among military voters).

41. *Id.*

quested, or they received the ballot too late for it to be returned in time.⁴² News coverage noted that soldiers experienced significant problems in receiving mail in Iraq with some reporting not receiving mail up to four months after it being sent.⁴³ Such problems are symptomatic of a long history of balloting difficulties for military voters, much of which stems from the multi-layered structure of election law that often results in conflict between state and federal principles.⁴⁴

III. CONFLICTING PRINCIPLES: STATE CONTROL VERSUS THE FEDERAL ROLE

Much of the conflict that arises concerning voting in the military results from the shared power that the federal and state governments have over federal elections, which has its roots in the U.S. Constitution.⁴⁵ Congress has broad power to regulate federal elections under the Elections Clause: “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”⁴⁶ Daniel R. Ortiz and Pamela S. Karlan note that “the Elections Clause has traditionally been interpreted [by the Supreme Court] to give Congress virtually plenary power over a wide range of aspects relating to congressional elections.”⁴⁷ As early as 1879, the Supreme Court evaluated the power of Congress to enact legislation, in that case “The Enforcement Act” of 1870, which sought to ensure citizens had the ability to vote in federal elections conducted by states “without

42. See FED. VOTING ASSISTANCE PROGRAM, DEP’T OF DEF., VOTING OVER THE INTERNET PILOT PROJECT ASSESSMENT REPORT 4-12 to 4-13 (2001), available at <http://www.fvap.gov/services/voireport.pdf>.

43. Karen Jowers, *Troops Want to Know: Where’s My Mail?!*, ARMY TIMES, May 10, 2004, at 1, available at <http://www.armytimes.com/legacy/new/0-ARMYPAPER-2872628.php>.

44. See *infra* Part III.

45. See U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-01-470, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION 1-2 (Mar. 2001), available at <http://www.gao.gov/new.items/d01470.pdf>.

46. U.S. CONST. art. I, § 4, cl. 1.

47. Pamela S. Karlan & Daniel R. Ortiz, *Congressional Authority to Regulate Elections*, in THE FEDERAL REGULATION OF ELECTIONS: BACKGROUND REPORT OF THE TASK FORCE ON LEGAL AND CONSTITUTIONAL ISSUES, in TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS: TASK FORCE REPORTS TO ACCOMPANY THE REPORT OF THE NATIONAL COMMISSION ON ELECTION REFORM pt. X. 14, 14 (2001), available at http://www.tcf.org/publications/electionreform/full_tf_report.pdf.

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molestation.”⁴⁸ An argument arose whether Congress could provide piecemeal changes to only some of the aspects of the state-run system or, should Congress want to have any effect at all, whether it needed to completely preempt state law and assume full control over the entire election process for federal offices.⁴⁹ The Court rejected this argument and established, pursuant to the Elections Clause, that:

[Congress] may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.⁵⁰

Thus, Congress may enact regulations and inject federal law into whatever limited aspects of state election procedures it deems necessary. This Congressional discretion clearly leaves open the door for more regulation of the conduct of federal elections and, in fact, would allow Congress to completely federalize such elections and override the patchwork of local election laws throughout the country if it desired to create true uniform standards and procedures for military and other overseas voters.⁵¹

Such power has continually been reiterated by the Supreme Court. In 1932, the Court again reviewed the Election Clause’s grant of power to Congress to regulate the time, place, and manner of federal elections and stated:

It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have ap-

48. *Ex parte Siebold*, 100 U.S. 371, 382 (1879).

49. *Id.*

50. *Id.* at 383-84.

51. *See id.*

propriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of “times, places and manner of holding elections.”⁵²

Such power includes the authority to regulate congressional primary elections, as they are a “necessary step” in choosing federal officeholders.⁵³ As recently as 1997, the Supreme Court has reaffirmed congressional supremacy in overriding state election procedures as they apply to federal elections.⁵⁴ One key characteristic of all of these cases is that Congress has not yet exercised its plenary power to completely dictate how federal elections take place, but has instead provided incremental and targeted regulation to address specific perceived problems with state-run elections. Congress’ exercise of such power to centralize and unify the laws and procedures relevant to voting in federal elections would certainly be one means by which military voting could be facilitated to a greater degree than the patchwork of state laws currently in place, by either mandating time frames for sending and receiving ballots or enacting compulsory technological solutions that obviate the ballot transit issue.

One aspect of elections that Congress cannot regulate at all is who is eligible to vote in federal elections. The right to determine who is eligible to vote in federal elections is granted to the states under Article I, Section 2 and the Seventeenth Amendment of the U.S. Constitution.⁵⁵ Each states that “the [e]lectors in each [s]tate shall have the [q]ualifications requisite for [e]lectors of the most numerous [b]ranch of the [s]tate [l]egislature.”⁵⁶ The Constitution

52. *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (finding that Congress may delegate to the states the process of drawing districts for its members).

53. *See United States v. Classic*, 313 U.S. 299, 320 (1941) (finding that Congress’ power to ensure the integrity of Congressional elections extends to state primary elections).

54. *See Foster v. Love*, 522 U.S. 67, 74 (1997) (invalidating Louisiana’s “open primary” held in October as a violation of 2 U.S.C. §§ 1 & 7, and setting a uniform day for electing Senators and Representatives); *see also* U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-01-470, *supra* note 45, at 5-7 (discussing recent cases upholding Congressional authority to determine registration procedures under the National Voter Registration Act of 1993).

55. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-01-470, *supra* note 45, at 21 n.1 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)); *see also* *Katzenbach v. Morgan*, 384 U.S. 641, 647 (1966) (stating that while “[u]nder the distribution of powers effected by the Constitution, the States establish qualifications for voting for state officers, and the qualifications established by the States for voting for members of the most numerous branch of the state legislature also determine who may vote for United States Representatives and Senators,” such qualification could not violate the Fourteenth Amendment).

56. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

charges the states, not the federal government, with setting voter eligibility requirements for federal elections, including the voting eligibility for military personnel.⁵⁷ Prior to universal military suffrage in 1971,⁵⁸ states and localities were reticent to allow military voters—especially military voters stationed overseas—to participate in elections because of the enfranchisement issues it raised.⁵⁹ Two examples illustrate this point. First, until the mid-1800s, several states only allowed property owners to vote, thus disenfranchising landless individuals serving in the military;⁶⁰ second, although African-Americans were able to serve in the military and were often forced to serve through the compulsory draft, they were denied voting rights by states that had Jim Crow laws and all-white primary elections.⁶¹ In both cases, individuals served their nation, often by force, yet state laws governing elections prevented their participation in the electoral process. Only through constitutional amendment has state discrimination against black voters, female voters, poor voters, and individuals aged eighteen through twenty ended.⁶² These four amendments have, over time, simplified the process of addressing the problems associated with voting by mili-

57. U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII.

58. The term “universal suffrage” refers to the full population having the right to exercise citizenship through voting. *See, e.g.,* ROBERT A. DAHL, *ON DEMOCRACY* 78, 89-90 (1998) (discussing early use of the term that excluded women and minorities, as well as stating that granting a universal right to vote is a precondition for democracy). In the context of the military, “universal suffrage” would be defined as the expansion of the right to vote to all Americans serving in the military: all races, both genders, and those over the age of eighteen.

59. *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 246-47 (2000) (discussing use of the poll tax and other means to disenfranchise black voters in the South, including those serving in the military).

60. *See id.* at 29.

61. *See id.* at 246-49.

62. *See* U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”); U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”); U.S. CONST. amend. XXIV (“The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”); U.S. CONST. amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”). Obviously, the passage of the Fifteenth Amendment did not stop racial discrimination. It was not until the passage of the Voting Rights Act in 1965 that states were forced to end most forms of legal discrimination against African-Americans and other minority voters. *See* Luis Fuentes-Rohwer, *Legislative Findings*,

tary personnel, as allowing military members to vote no longer sets a bad precedent by enfranchising those ‘unwanted’ classes of voters who happen to be serving in the military.⁶³

The combination of Congress’ incremental exercise of its regulatory authority over federal elections and the interplay between federal and state control over elections, often rooted in attempted disenfranchisement, resulted in very slow progress in the expansion of both the right and ability of military voters to cast ballots in federal elections.⁶⁴ Often wars or other major military mobilizations drove the improvements that ultimately occurred in both the enfranchisement and procedural aspects of military voting.⁶⁵

IV: A HISTORY OF MILITARY VOTING

A. Starting at the Beginning: The Revolutionary War

Before there was even a United States or a Constitution, there was a war and debate over whether individuals who had fought that war should be eligible to vote, despite legal barriers to their participation in the political process.⁶⁶ Many observed at the time that to deny men who had fought for their country’s cause the right to vote was a significant injustice, and “‘every man in the country who manifests a disposition to venture his all for the defense of its liberty, should have a voice in its council.’”⁶⁷ During the Revolutionary War, state militia associations, which were typically comprised of working class individuals, agitated for the abolition of certain restrictions on suffrage such as property or landholding requirements.⁶⁸ In many states, including Georgia, Maryland, New Jersey, New York, North Carolina, Vermont, and Pennsylvania, the franchise was expanded to include many more working class individuals.⁶⁹ Many other states did not change their laws governing the franchise during the war, even though this created a situation

Congressional Powers, and the Future of the Voting Rights Act, 82 IND. L.J. 99, 99 (2007).

63. See generally KEYSSAR, *supra* note 59, at 268-84 (discussing breakdown of barriers to voting including elimination of the poll tax, literacy tests, and loosening of residency requirements).

64. See *infra* Part IV.

65. See *infra* Part IV.

66. KEYSSAR, *supra* note 59, at 8-14 (discussing the Revolutionary War era’s debate over the conception of voting as a “natural right”).

67. *Id.* at 14 (quoting a Philadelphia pamphleteer believed to be Thomas Young).

68. See *id.* at 13-15.

69. *Id.* at 16-18 (noting the reduction in freehold requirements for voting in these states and the complete separation of voting from financial circumstances in Vermont).

where many of the men who served in the state's militia during the war were unable to participate in the political process within their state or benefit politically from the freedoms for which they were fighting.⁷⁰ Thus, the key issue related to voting in the Revolutionary War and its immediate aftermath was not *how* individuals voted—the methods or procedures used—but rather *who* could vote.⁷¹

Over the next eighty years, the rights of military voters were a relatively low priority in many states,⁷² although there was further incremental expansion of the franchise. Between the Revolutionary War and the Civil War, the United States engaged in only two major conflicts—the War of 1812 and the Mexican American War—and many smaller military actions such as fighting the Barbary pirates.⁷³ The War of 1812 once again raised the issue of military voting in the context of “fairness” and led to a further extension of the franchise through the relaxation of property ownership requirements.⁷⁴ But significant change in military voting would not occur until the Civil War, as the nation would undergo the largest military mobilization in its history, where half of all Northern men of military age and nearly seventy-five percent of all Southern white men were serving in the army or navy.⁷⁵ With this large a percentage of the population serving in the military, pressures to improve voting rights for military personnel were bound to come to the forefront.⁷⁶

B. The Civil War and the 1864 Presidential Election

Although it is now taken for granted, the election of 1864 was an amazing phenomenon. No nation had ever held a general election

70. *Id.* at 18 (stating that Rhode Island, Delaware, Connecticut, South Carolina, and Virginia generally retained their pre-colonial voting requirements, but noting that Massachusetts actually stiffened the requirements).

71. *Id.* at 8-18.

72. See William M. Burcher, *A History of Soldier Voting in the State of New York*, 25 N.Y. HIST. 459, 460 (1944) (noting that there was no agitation for absentee soldier voting between 1777 and 1863).

73. A complete history of these smaller wars can be found in MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* 3-30 (2002).

74. See KEYSSAR, *supra* note 59, at 37-38 (noting that between 1817 and 1820 Connecticut, New York, and Mississippi removed the property or taxpaying requirements for voting for those serving in the state militia).

75. JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 202 (3d ed. 2001).

76. See KEYSSAR, *supra* note 59, at 87.

in the middle of a war, much less a Civil War.⁷⁷ There had never been a similar situation where there was, in essence, a referendum on an ongoing war where all citizens, including those doing the fighting, could participate.⁷⁸ Two critical questions arose in this first effort to enfranchise military personnel to vote in the election. First, by what procedures could Union soldiers participate in the 1864 election? Second, would the military vote have any direct impact on the outcome of the 1864 election?

Laws governing the participation of military voters varied from state to state, but in nineteen Northern states, military men could vote using absentee procedures, creating one of the first instances of remote voting in America.⁷⁹ Several Northern states, including Indiana, did not allow absentee voting, in part because such laws had been blocked by Democrats who feared the soldier vote.⁸⁰ To accommodate these military voters, President Abraham Lincoln exercised his power as commander-in-chief and called for a cessation of military operations prior to the election to allow military personnel from affected states to go home and vote.⁸¹ As a result, Democrats charged that many of the voters who came home to Indiana to cast their ballots were actually residents of other states, although there were also documented cases of fraud, such as two Democratic commissioners from New York in charge of collecting soldier votes convicted for stuffing the ballot box.⁸²

The 1864 election centered around one issue: war and peace.⁸³ Democrats, led by former Union General George B. McClellan, were seen as the party of peace (although the question of whether peace could come only if the South recognized the Union divided Democrats throughout the election campaign).⁸⁴ By contrast, Lincoln's position was clear: the war would continue until the South capitulated.⁸⁵ Because the 1864 election took place after a string of decisive military victories by Union forces, including the destruc-

77. See MCPHERSON, *supra* note 75, at 492.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 493.

82. *Id.*; see also Oscar Osburn Winther, *The Soldier Vote in the Election of 1864*, 25 N.Y. HIST. 440, 449-53 (1944) (discussing in detail the trial and conviction of the agents involved in the New York voting scandal, Moses J. Ferry and Edward Donahue, Jr., and the alleged voter fraud in Indiana).

83. See generally MCPHERSON, *supra* note 75, at 471-76, 492-94; Winther, *supra* note 82, at 448-49.

84. MCPHERSON, *supra* note 75, at 475-76.

85. *Id.* at 473.

tion of Atlanta, many in the military viewed the Democrats' position of seeking peace without conditions as being unfaithful to the troops.⁸⁶ This characterization was enhanced by Republican efforts to link Northern Democrats with anti-war and anti-Union activities.⁸⁷ Letters from Union soldiers suggested that they thought a Democratic victory would bring shame and dishonor on soldiers who had sacrificed for the Union cause.⁸⁸

Lincoln recognized that the military vote could be critical to his re-election and maintaining a Republican majority in Congress.⁸⁹ In the twelve states where civilian and military votes were counted separately, Lincoln won seventy-eight percent of the military vote.⁹⁰ Although military voters were key members of the Lincoln electoral coalition, there is some controversy regarding their importance. Some scholars argue that the soldier vote provided the margin of victory in six states (Connecticut, Illinois, Indiana, New Jersey, New York, and Maryland) and that McClellan would have won the election but for the soldier vote in these states.⁹¹ The data in Table 1, however, show that the soldier vote enhanced marginal victories that Lincoln would have achieved with only the civilian vote. Nonetheless, the soldier vote was likely critical in congressional races, and it solidified the Republican control of Congress. In the 1864 House elections, thirty-one seats were won by a margin smaller than one thousand votes.⁹² Of these, eight were won by Democrats, while twenty-three were won by Republicans, part of an overall forty-two seat pick-up for Republicans.⁹³

86. *Id.* at 493.

87. *Id.* at 482.

88. See BRUCE CATTON, *A STILLNESS AT APPOMATTOX* 323 (Doubleday & Company, Inc. 1957) (1953); MCPHERSON, *supra* note 75, at 493.

89. See MCPHERSON, *supra* note 75, at 493.

90. *Id.*

91. SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE: RED RIVER TO APPOMATTOX* 625 (1974).

92. See CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 940-41 (5th ed. 2005).

93. *Id.* at 940-41, 1635.

TABLE 1. VOTE MARGINS FOR THE 1864 PRESIDENTIAL ELECTION, BY STATE⁹⁴

| State | Total Vote | | | Military Vote | | |
|----------------------------|------------|-----------|--------------|---------------|-----------|--------------|
| | Lincoln | McClellan | Differential | Lincoln | McClellan | Differential |
| California | 62,053 | 43,837 | 18,216 | 2,600 | 237 | 2,363 |
| Connecticut | 44,673 | 42,285 | 2,388 | | | |
| Delaware | 8,155 | 8,767 | (612) | | | |
| Illinois | 189,512 | 158,724 | 30,788 | | | |
| Indiana | 149,887 | 130,230 | 19,657 | | | |
| Iowa | 83,858 | 49,089 | 34,769 | 15,178 | 1,364 | 13,814 |
| Kansas | 17,089 | 3,836 | 13,253 | 2,867 | 543 | 2,324 |
| Kentucky | 27,787 | 64,301 | (36,514) | 1,194 | 2,823 | (1,629) |
| Maine | 67,805 | 46,992 | 20,813 | 4,174 | 741 | 3,433 |
| Maryland | 40,153 | 32,739 | 7,414 | 2,800 | 321 | 2,479 |
| Massachusetts | 126,742 | 48,745 | 77,997 | | | |
| Michigan | 91,133 | 74,146 | 16,987 | 9,402 | 2,959 | 6,443 |
| Minnesota | 25,031 | 17,376 | 7,655 | | | |
| Missouri | 72,750 | 31,596 | 41,154 | | | |
| Nevada | 9,826 | 6,594 | 3,232 | | | |
| New Hampshire | 36,596 | 33,034 | 3,562 | 2,066 | 690 | 1,376 |
| New Jersey | 60,724 | 68,020 | (7,296) | | | |
| New York [‡] | 368,735 | 361,986 | 6,749 | 209 | 96 | 113 |
| Ohio | 265,674 | 205,609 | 60,065 | 41,146 | 9,757 | 31,389 |
| Oregon | 9,888 | 8,457 | 1,431 | | | |
| Pennsylvania | 296,292 | 277,443 | 18,849 | 26,712 | 12,349 | 14,363 |
| Rhode Island [‡] | 14,349 | 8,718 | 5,631 | 162 | 28 | 134 |
| Vermont | 42,419 | 13,321 | 29,098 | 243 | 49 | 194 |
| West Virginia [‡] | 23,799 | 11,078 | 12,721 | 76 | 6 | 70 |
| Wisconsin | 83,458 | 65,884 | 17,574 | 11,372 | 2,458 | 8,914 |

‡ = Vote totals are for the Army of the Potomac only.

The 1864 election featured new legal mechanisms—remote and absentee voting—that allowed military personnel serving away from home to participate in the electoral process.⁹⁵ For example, election officials from a state traveled to the units in the field, set up a polling place, and collected ballots from the soldiers.⁹⁶ These procedures enfranchised hundreds of thousands of men serving

94. Adapted from Winther, *supra* note 82, at 455-57.

95. See Winther, *supra* note 82, at 441-48 (discussing the implementation of new procedures in numerous Northern states to accommodate and facilitate soldier voting).

96. See, e.g., *id.* at 454 (discussing the process of “camp elections”).

their country and also had a major impact in the outcome of a federal election that influenced the prosecution of an ongoing conflict in which they were engaged as combatants.⁹⁷ This case illustrates how concentrated efforts and well-designed voting processes and procedures can improve the enfranchisement rate of military voters as well as affect who represents the people in government.

C. From a Civil War to a World War

After the Civil War, the election landscape in the states changed in several ways. First, to combat actual or perceived election fraud, many states adopted voter registration laws that were intentionally quite restrictive.⁹⁸ Individuals had to register to vote before going to the polls on Election Day; in some cases, individuals had to re-register in person before each general election.⁹⁹ Not surprisingly, these restrictions were quite burdensome to many voters, including soldiers not at home, and they led to a significant decrease in voting.¹⁰⁰ Second, the Civil War served as the impetus for more states to adopt absentee voting laws.¹⁰¹ Prior to 1861, Oregon was the only state that allowed men who were away from home on Election Day to cast their ballots from a remote location.¹⁰² As Alexander Keyssar notes, “the Civil War—and the desire to permit soldiers to vote during the war—severed the link between voting and physical presence in a community.”¹⁰³ Still, many absentee voting laws benefited only citizens within the state on Election Day. For example, in 1913, Missouri and North Dakota allowed “voters who are absent from their regular election districts on the day of an election to send home their ballots by mail *from any point within their respective States*.”¹⁰⁴ Only eight states extended absentee voting rights to primary elections, and Minnesota explicitly precluded ab-

97. See MCPHERSON, *supra* note 75, at 492-93.

98. See KEYSSAR, *supra* note 59, at 128-29 (discussing tightening of voting requirements post-Civil War including literacy tests, property restrictions, and the creation of “complex, cumbersome registration procedures”); *id.* at 152-53 (discussing changes to registration procedures among the states between 1870 and World War I).

99. See *id.* at 152-54 (discussing the New Jersey requirement to re-register each election year and the Illinois requirement that voters appear before an election judge on the Tuesday three or four weeks prior to each election).

100. See *id.* at 158.

101. See *id.* at 150.

102. *Id.*

103. *Id.*

104. P. Orman Ray, *Absent Voters*, 8 AM. POL. SCI. REV. 442, 442 (1914) (emphasis added).

sentee voting in primaries.¹⁰⁵ By 1918, only eighteen states had adopted laws designed explicitly to enfranchise soldiers whose military service prevented them from voting in their home precinct.¹⁰⁶ Twenty-six states had absentee voting laws that would cover military personnel, although this coverage was not always explicit.¹⁰⁷

These new absentee voting laws were not intended for soldiers stationed overseas.¹⁰⁸ As burdensome as voting was for many men who fought in the Civil War, the difficulties faced in 1864 were simple compared to those encountered by the soldiers voting in the congressional elections of 1918, when approximately two million soldiers were stationed overseas.¹⁰⁹ Not all of these men were eligible to vote, as some were under the age of twenty-one, but the obstacles to overcome for those who did want to vote were daunting.¹¹⁰

Consider the impossibilities of the absentee voting law in Missouri. There, a military absentee voter was required to request an absentee ballot in person or by mail not less than five days or more than fifteen days before the election.¹¹¹ Assuming that a request for such a ballot arrived at a registrar's office exactly fifteen days before the election and was promptly processed; a soldier stationed in France would have only two weeks for the requested ballot to be mailed to him overseas, for him to mark the ballot, and for the ballot to be returned. Considering that the first non-stop trans-Atlantic airplane flight did not occur until 1919, the odds were long that a ballot could get from St. Louis to France and back in two weeks.¹¹²

105. P. Orman Ray, *Absent-voting Laws, 1917*, 12 AM. POL. SCI. REV. 251, 252-53 (1918) [hereinafter Ray, *Absent-voting Laws*].

106. P. Orman Ray, *Military Absent-Voting Laws*, 12 AM. POL. SCI. REV. 461, 461 (1918) [hereinafter Ray, *Military Absent-Voting Laws*].

107. *See id.*; *see also generally* Ray, *Absent-voting Laws*, *supra* note 105 (discussing explicit statutes regarding military voting and the "North Dakota" style of absentee voting law that enfranchised soldiers without explicit mention of them).

108. *See* Ray, *Military Absent-Voting Laws*, *supra* note 106, at 463 (detailing voting requirements with which it would be essentially impossible for soldiers overseas to comply); *see also* Martin, *supra* note 36, at 722 (noting that the military actively prevented states from collecting votes from soldiers on foreign soil claiming it would disrupt the war effort).

109. Martin, *supra* note 36, at 723-24.

110. *See id.*

111. *See* Ray, *Military Absent-Voting Laws*, *supra* note 106, at 463.

112. *See* William Warntz, *Transatlantic Flights and Pressure Patterns*, 51 GEOGRAPHICAL REV. 187, 195 (1961) (discussing first non-stop flight across the Atlantic by Alcock and Brown).

Thus, in World War I, state election laws and federal governance issues effectively disenfranchised military personnel serving overseas.¹¹³ The governance issues were highlighted by the War Department's decision that men stationed overseas would not be able to participate in the 1918 election.¹¹⁴ Additionally, two pieces of federal legislation that would have facilitated military voting in 1918 were not acted upon.¹¹⁵ One bill would have created a Federal Election Commission to oversee voting by military personnel, and a second would have made it easier for military voters to vote for federal offices.¹¹⁶ The Department of War initially refused to supervise voting in congressional elections by soldiers serving overseas but suggested that states would be able to conduct elections in order to enfranchise soldiers from their respective states.¹¹⁷ The Department of War later decided that "the soldier vote could not be taken in France or on other foreign soil in the theater of war without serious interference with military efficiency."¹¹⁸ For those soldiers away from home but still on U.S. soil, the option of voting via absentee ballot existed but it is not known what percentage of these servicemen voted.¹¹⁹ The millions of soldiers deployed in the European theatre in 1918, however, likely found it difficult, if not impossible, to vote.¹²⁰ Importantly, military votes—or the lack thereof—may have affected control of Congress; twenty-four House seats in 1918 were decided by fewer than 1000 votes and control of Congress switched from the Democrats to the Republicans.¹²¹

D. Voting in a True World War

In World War I, the country participated in a war in Europe that lasted less than three years and resulted in U.S. forces serving away from home during only one mid-term election. Between the two World Wars, the United States had no sizable force stationed overseas to be affected by the absentee voting procedures in the states. As a result, a "period of stasis" ensued, and the states took little

113. See Martin, *supra* note 36, at 723.

114. *Id.* at 722.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 723.

120. *Id.* at 723-24.

121. See CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS, *supra* note 92, at 1061-65, 1635.

action to improve absentee military voting laws.¹²² The lengthy U.S. involvement in World War II, however, created pressure for the military to facilitate the soldier vote and counter-pressure to ensure that military men did not get ballots.¹²³ The conflict between those who wanted to facilitate the military vote and those who wanted to prevent it illustrates the problems that vexed military voting prior to the granting of universal suffrage in 1971.

The problem of facilitating military suffrage in World War II was daunting. By 1942, several million American soldiers were stationed away from home throughout North America, Europe, Africa, Asia, and the Pacific.¹²⁴ Soldiers did not serve in units or battalions based on their place of origin, unlike during the Civil War, making it extremely difficult for states to send out election materials.¹²⁵ One battalion in Italy, for example, was comprised of men from thirty-nine different states.¹²⁶ Most states also retained the stringent voter registration requirements that were adopted during the progressive era. Military personnel were still expected to register to vote—often in person—and to maintain their registration—often through annual renewals—while serving overseas or otherwise away from home.¹²⁷ Most states failed to differentiate among those absentee voters serving overseas, those serving in the continental United States, and civilians on the home front serving the nation in other ways.¹²⁸ Likewise, with the exception of Mississippi and South Carolina, all states that had poll taxes required military personnel to pay these taxes before voting.¹²⁹

The absentee ballot laws in the forty-eight states remained quite divergent. In total, thirty-four states had relatively liberal absentee voting laws and another eleven states had limited absentee voting laws.¹³⁰ For instance, some states would not allow military voting in primary elections or voting for any office except the presidency.¹³¹ Other states had liberal absentee voting rules for soldiers

122. See KEYSSAR, *supra* note 59, at 230.

123. See Martin, *supra* note 36, at 724 (noting pressure groups, congressional hearings, and public demand for service voting).

124. See *id.* (stating that by 1942 service members were “spread to the four corners of the earth” and the “problem of placing a ballot in the hands of every qualified elector in the service seemed astronomical”).

125. See *id.*

126. *Id.*

127. See KEYSSAR, *supra* note 59, at 151-59.

128. Martin, *supra* note 36, at 731.

129. *Id.* at 725.

130. See *id.* at 724.

131. *Id.*

casting a ballot from within the confines of the state, but not from an aircraft carrier in the middle of the Pacific Ocean.¹³² Three states did not allow absentee voting.¹³³

The implementation of state absentee voting laws for military voters remained difficult primarily because of ballot transit issues. In many states, the statutory requirement for the time from when an absentee ballot would be issued to when it had to be returned was less than thirty days.¹³⁴ Even in peacetime this would be a challenge for a soldier stationed outside the United States; the war made this challenge more daunting. Congress attempted to address the non-uniformity of state laws prior to the 1942 mid-term election via the Soldier's Vote Act by requiring states to create a federal ballot that allowed soldiers to vote for the four major federal offices—a President, Vice-President, Senator, and Representative; states could also choose to add state or local races.¹³⁵ The Department of War provided soldiers with a post card which, if sent to their state's Secretary of State, would result in receipt of a federal ballot.¹³⁶ The Department of War would then facilitate getting the ballot back to the appropriate Secretary of State to be counted.¹³⁷

One interesting feature of the 1942 law is that it had a mechanism for each Secretary of State to submit to the Treasury Department an estimate of the costs associated with implementation of this Act.¹³⁸ The Treasury would reimburse the state for the costs incurred, including “the expense of preparing and printing post cards, official war ballots, booklets, envelopes, instructions, and

132. *See id.*

133. *See id.*

134. *See* Am. Political Sci. Ass'n, *Findings and Recommendations of the Special Committee on Service Voting*, 46 AM. POL. SCI. REV. 512, 515 (1952) (republishing portions of H.R. Doc. No. 82-407 (1952)) [hereinafter APSA, *Recommendations*]; *see also* Martin, *supra* note 36, at 724.

135. *See* Martin, *supra* note 36, at 725 (describing terms of Soldier's Vote Act); *see also* Soldier's Vote Act (Armed Forces Absentee Voting Act), ch. 561, 56 Stat. 753 (1942) (repealed 1955) (stating it was “[a]n act to provide for a method of voting, in time of war, by members of the land and naval forces absent from the place of their residence”).

136. *See* Martin, *supra* note 36, at 725; *see also* 56 Stat. 753 § 3 (“Every member of the land or naval forces of the United States absent from the place of his residence may make request of the secretary of state of the State of his residence for a ballot suitable for use in voting in accordance with the provisions of this Act. The Secretary of War and the Secretary of the Navy shall cause to be printed and distributed to such members of the land and naval forces an adequate number of post cards which shall be used by each such member in making such request.”).

137. *See* Martin, *supra* note 36, at 725; *see also* 56 Stat. 753 § 3.

138. *See* Martin, *supra* note 36, at 725; *see also* 56 Stat. 753 § 10.

other supplies, and the cost of mailing and express charges.”¹³⁹ This makes the 1942 law one of the first, if not the first, cases where the federal government subsidized state and local election administration.

While this law sought to facilitate voting by improving ballot accessibility, it did not address voter registration and eligibility. Soldiers still had to follow the state’s registration rules, although eligible voters could not be subject to poll taxes or similar taxes.¹⁴⁰ This Act does not seem to have facilitated many military votes; fewer than 140,000 federal ballots were requested, and only 28,051 were validly cast.¹⁴¹ A subsequent analysis conducted by the Bureau of the Census found that, among the four reasons for its failure, the law was enacted too close to the election for states to implement it effectively.¹⁴² Because the law was passed on September sixteenth, its effect on the November election was deemed to be “nearly worthless.”¹⁴³

In 1943, members of Congress pressed for more effective legislation to facilitate military voting in the upcoming 1944 election cycle.¹⁴⁴ In part, this was a partisan decision. Polling done by George Gallup in 1943 found that the 1944 election was a toss-up among the general public.¹⁴⁵ Sixty-one percent of the military vote (over six million), however, was predicted to go to President Roosevelt and the Democrats.¹⁴⁶ As was the case in 1864, military

139. See 56 Stat. 753 § 10 (“There are authorized to be appropriated, to be expended as provided in this section, such amounts as may be necessary to pay the expenses of carrying out the provisions of this Act, including the expense of preparing and printing post cards, official war ballots, booklets, envelopes, instructions, and other supplies, and the cost of mailing and express charges.”).

140. *Id.* § 2 (“No person in military service in time of war shall be required, as a condition of voting in any election for President, Vice President, electors for President or Vice President, or for Senator or Member of the House of Representatives, to pay any poll tax or other tax or make any other payment to any State or political subdivision thereof.”).

141. See Martin, *supra* note 36, at 725-26. Of course, soldiers could vote using their state’s traditional absentee voting laws, but these provisions were almost always inadequate for addressing the needs of soldiers serving overseas. See *id.* at 724-25 (describing state absentee procedures and difficulties complying with them by soldiers).

142. See *id.* at 726.

143. See COLEMAN, *supra* note 27, at 2 (quoting THE FED. VOTING ASSISTANCE PROGRAM, DEP’T OF DEF., 11TH REPORT 2 (1977)).

144. See Martin, *supra* note 36, at 726 (discussing Green-Lucas bill introduced in 1943 to expand military voting).

145. George Gallup, *Vote of Soldiers Could Decide ‘44 Election, Gallup Poll Finds*, N.Y. TIMES, Dec. 5, 1943, at 48.

146. *Id.*

voters were seen as able to affect the outcome of presidential and congressional races, and Democratic members wanted to make the military voting process as simple as possible. Facing pressure from the public and soldiers to ensure that military personnel could participate in the electoral process, Congress considered two approaches to facilitate military voting. One approach—sponsored by Senators Theodore F. Green (Rhode Island Democrat) and Scott W. Lucas (Illinois Democrat) and favored by the President and Northern Democrats—would have created a war ballot that would be distributed to American troops by a War Ballot Commission.¹⁴⁷ In order to vote, soldiers would only have to fill out the ballot and it would be returned to the appropriate secretary of state to be counted.¹⁴⁸

This approach was opposed by Republicans, who did not want to increase the size of the Democratic electorate, and by Southern Democrats, who did not want federal officials interfering with state suffrage, especially by potentially enfranchising African-Americans normally excluded from voting by Jim Crow restrictions.¹⁴⁹ The bill supported by President Roosevelt and Northern Democrats would have exempted military personnel from poll taxes, one of the most effective means of disenfranchising African-American and poor white voters in the South.¹⁵⁰ Because the federal government cannot set state suffrage requirements, opponents of the Green-Lucas legislation argued that it was unconstitutional.¹⁵¹ Opponents of Green-Lucas arguing for states' rights effectively gutted it through the amendment process.¹⁵² This new bill required states to use the federal ballot only if: (1) a state failed to establish effective absentee voting procedures, (2) the federal ballot was certified by the state, and (3) a military voter had not received a requested traditional absentee ballot.¹⁵³ The 1944 law liberally used the

147. See Martin, *supra* note 36, at 726-27.

148. *Id.* The war ballot only included federal races. States had the option of adding state races to the ballot if they desired. *Id.* at 725-27.

149. *Id.*

150. *Id.*

151. *Id.* at 727-28.

152. *Id.* at 729.

153. See *id.* (noting limitations in amended 1944 Green-Lucas bill, which Congress passed as Act of April 1, 1944, ch. 150, 58 Stat. 136, 136-40 (repealed 1955)).

phrase “recommends to the states,”¹⁵⁴ as opposed to the word “shall,” which was used consistently throughout the 1942 law.¹⁵⁵

Even with the weaker federal law, the 1944 election saw military voting that far exceeded the projections of political analysts. Turn-out among the general population was sixty percent while fifty percent of military personnel requested ballots and thirty percent succeeded in casting ballots, even with the associated logistical problems.¹⁵⁶ There are some discrepancies regarding how many military personnel voted, with the *New York Times* reporting that between 3.1 million and 4.4 million soldiers voted in the 1944 election,¹⁵⁷ and the American Political Science Association (“APSA”) reporting that 4,487,540 military personnel requested ballots and 2,691,160 submitted ballots that were counted in the totals.¹⁵⁸ With the two presidential candidates only separated by a total of 3.5 million votes in the final outcome, military votes were significant in the final result. In New Jersey the military vote tipped the state from Republican Thomas Dewey, who won the civilian vote, to President Roosevelt, who dominated the military vote.¹⁵⁹ The 1944 election also helped the Democratic Party rebound from its mid-

154. *See, e.g.*, 58 Stat. 136, 136-40 § 201 (“The Congress hereby expresses itself as favoring, and recommends to the several States the immediate enactment of, appropriate legislation to enable each person absent from the place of his residence and serving in the armed forces of the United States” to vote by absentee ballot); *id.* § 204 (“Such post cards may be used, if State law permits, as applications for ballots under State absentee balloting laws.”); *id.* § 207(a) (“It is recommended that the secretary of state of each of the several States, upon receipt of any such post-card application, promptly forward it to the proper county, city or other election official.”); *id.* § 207(d) (“It is recommended that, in States where the voters’ absentee ballot will not be available for mailing to the voter forty-five days prior to any primary, general or special election, such States cause to be made such changes in the election laws of their States as will lengthen such time.”).

155. *See, e.g.*, Soldier’s Vote Act (Armed Forces Absentee Voting Act), ch. 561, 56 Stat. 753 § 2 (1942) (repealed 1955) (“No person in military service in time of war shall be required, as a condition of voting in any election . . . to pay any poll tax or other tax.”); *id.* § 4(a) (“Each secretary of state, upon receipt of postcards prepared pursuant to section 3, shall, from time to time, prepare for, and cause to be transmitted to each canvassing board . . . a statement containing the names and addresses of, and such other information appearing on the postcard as may be appropriate.”); *id.* § 5 (“The secretary of state of each State shall cause to be prepared and printed, for use in voting under this Act, an appropriate number of official war ballots.”).

156. *See* APSA, *Recommendations*, *supra* note 134, at 513.

157. *See* Martin, *supra* note 36, at 732 (citing Leo Egan, *Service Ballots Put at 4,400,000 in Last Election*, N.Y. TIMES, Dec. 10, 1944, at 1).

158. *See* APSA, *Recommendations*, *supra* note 134, at 513.

159. Egan, *supra* note 157, at 48.

term losses in the 1942 House races; the military vote may have played a key role in some of these races.¹⁶⁰

E. Uniform Voting Laws for Uniformed Voters

After World War II ended, pressure remained to create a permanent uniform national voting procedure that would address the needs of all military personnel overseas. It was clear that the United States would remain a world military power with forces stationed around the globe for extended periods. President Harry S. Truman saw a need to study the military voting issue systematically, and in 1951 he asked the APSA to establish a commission for the purpose of making recommendations regarding how to improve voting among military service personnel.¹⁶¹ In 1952, the APSA's Special Committee on Service Voting released its findings.¹⁶² The report found that because of the lateness of the 1942 law and the voluntary nature and states' rights framework of the 1944 statute, these laws had either minimal or limited success in increasing the military vote.¹⁶³ The threat of a federal ballot had indeed stimulated some states to improve their absentee ballot laws.¹⁶⁴ Military voting remained infrequent, however, in many states, especially in the Democratic South, where voting in general elections at the time was not particularly meaningful.¹⁶⁵

The APSA report also found that voting by military personnel had become harder since 1944, even though Congress had again passed legislation in 1946 encouraging states to improve their military voting laws.¹⁶⁶ For example, six states continued to require registration in person, five states had special absentee ballot application procedures (a military voter literally had to apply to apply for a ballot!), and twenty states had very short windows for re-

160. *Id.*

161. See APSA, *Recommendations*, *supra* note 134, at 512-13.

162. See *id.* at 513.

163. See *id.* at 513-14.

164. See *id.* at 514.

165. In the South, it was the primary election, rather than the general election, that was important for determining representation. See KEY, *supra* note 12, at 407 (noting that the office in the South, during this period, was usually won by the Democratic candidate by an overwhelming majority and that such candidates therefore often ran unopposed in the general election). In the 1944 presidential election, Southern voting in both the primary and general election was not particularly meaningful, as Roosevelt won all of the Southern states handily. See CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS, *supra* note 92, at 704.

166. APSA, *Recommendations*, *supra* note 134, at 514-15.

questing and returning an absentee ballot.¹⁶⁷ New Mexico and South Carolina no longer even had absentee voting procedures, and Texas did not allow members of the regular armed forces to vote.¹⁶⁸

APSA made a series of recommendations to make voting simple for military personnel.¹⁶⁹ First, it offered ten recommendations to improve the rights of military voters, including doing away with poll taxes, literacy tests, and difficult registration and residency requirements.¹⁷⁰ APSA recommended that military personnel should be able to use a federal post card application for a ballot, receive ballots well before the election, and receive information about the election and voting procedures.¹⁷¹ Second, APSA recommended that all states change their election laws to conform to its ten principles, focusing especially on the poll tax and registration requirements.¹⁷² Third, APSA recommended that the federal law be changed to ensure that military voting was always promoted, not just during national emergencies.¹⁷³ Fourth, APSA called on the Secretary of Defense to collect data and publish reports on military voting and whether states were fulfilling their obligations to promote it.¹⁷⁴ Fifth, it encouraged political parties and interest groups, such as the League of Women Voters, to promote military voting and to develop mechanisms to provide election information to military personnel.¹⁷⁵ Finally, APSA encouraged the creation of a National Bipartisan Commission on Voting to promote election reform.¹⁷⁶

Rather than implement such sweeping changes in the form of mandatory requirements, Congress passed the 1955 Federal Voting

167. *Id.* (noting that Alabama, Delaware, Florida, Louisiana, South Carolina, and Utah required in-person registration, while Arkansas, Florida, Indiana, Montana, and Utah required an application for an application).

168. *Id.*

169. *Id.* at 517-20.

170. *Id.* at 517.

171. *Id.*

172. *Id.* ("By long tradition and accepted practice, the responsibility for election administration in the United States is vested in the State governments. We believe they should retain that responsibility and should take steps to exercise it more effectively. We therefore recommend legislative action in those States where necessary to bring their voting laws into conformity with the following principles.").

173. *See id.* at 518 (recommending removal of the words "in time of war" from each of the first two sections of 50 U.S.C. §§ 301-02).

174. *Id.* at 519.

175. *Id.*

176. *Id.* at 519-20.

Assistance Act,¹⁷⁷ which implemented many of APSA's recommendations as voluntary standards and recommendations for absentee voter registration and voting procedures for the states to follow in order to facilitate voting by military and civilian support personnel stationed overseas.¹⁷⁸ The 1944 Act was only relevant in times of war, so the new law benefited the approximately three million military personnel serving during the Cold War in addition to civilian support personnel and dependents.¹⁷⁹ Likely at the insistence of Southern Senators, however, the states retained the right to determine who in the military services would and would not be enfranchised.¹⁸⁰ While these limitations hampered the extension of full voting rights to military personnel, the 1955 Act set the stage for future federal voting reforms by requiring the President to designate an executive department or agency to "coordinate and facilitate" federal military voting and issue a report every odd-numbered year on the issues affecting military voters.¹⁸¹ This Act also required states to furnish requested data to this designee, and required other federal agencies—especially the Attorney General and the General Services Administration—to cooperate with the designee in implementing the 1955 Act.¹⁸²

Although the APSA report came out before the 1952 general election, its findings would have been little changed if it had been released a year later. It was estimated that forty percent of the 2.5 million military personnel were directly disenfranchised because of complex state absentee voting regulations in place at the time.¹⁸³ For example, there were approximately 260,000 soldiers stationed in Korea in 1952, and officers estimated that approximately thirty percent attempted to vote.¹⁸⁴ Trying to vote and actually voting, however, were two different things as one civilian radio reporter amply demonstrated.¹⁸⁵ Robert Alden received his absentee ballot

177. See Federal Voting Assistance Act of 1955, ch. 656, 69 Stat. 584 (repealed 1986).

178. *Id.*

179. Compare Act of Apr. 1, 1944, ch. 150, 58 Stat. 136 § 201 (repealed 1955) (stating that law is applicable to voting in election "in time of war"), with 69 Stat. 584 (stating that law is applicable "in any primary, special, or general election held in his election district or precinct").

180. See 69 Stat. 584 § 101 (stating that provisions apply if a service member "is otherwise eligible to vote in that election").

181. *Id.* § 201.

182. *Id.* § 103.

183. Robert Alden, *Stevenson Leads by 2 to 1 in Poll of 500 U.S. Army Men in Korea*, N.Y. TIMES, Nov. 1, 1952, at 1.

184. Robert Alden, *30% of Soldiers in Korea Voting*, N.Y. TIMES, Nov. 3, 1952, at 1.

185. *Id.*

from New York County on October 31, the same day that ballots were required to be received by election officials in New York.¹⁸⁶ Furthermore, some state absentee voting laws contradicted the state constitution. For example, New Jersey law only allowed military personnel to vote with an absentee ballot under certain situations because of a concern for fraud, even though New Jersey's 1844 Constitution explicitly enfranchised all absentee voters.¹⁸⁷

By 1965, Congress had passed laws to end the systematic disenfranchisement of African-Americans.¹⁸⁸ With the franchise broadened, political parties began to engage in more organized efforts to turn out the military vote, and in the 1960s the issue of military voting took on a decidedly partisan tone.¹⁸⁹ In 1968, the Republican National Committee appointed absentee voting chairmen in forty-five states and the District of Columbia to register and mobilize the estimated 3.5 million military voters.¹⁹⁰ The European Republican Committee encouraged the two million Americans in Europe to vote by having Shirley Temple Black tour European cities to encourage Republicans overseas to vote.¹⁹¹ Democrats tried to mobilize overseas voters in twenty-six countries through "Americans Abroad for Humphrey-Muskie" committees that ran ads to encourage Democrats to vote.¹⁹²

The military itself also sought to assist in the voting process. The military set up temporary voter information stations in Laos, Thailand, and Vietnam in 1968 to inform military voters about each state's absentee voting laws.¹⁹³ The military also encouraged soldiers to vote through various ads in the *Army Reporter*, armed forces radio, and the armed forces television networks. Additionally, voting assistance officers in the various military branches encouraged soldiers to vote and answered questions regarding the election rules in the states.¹⁹⁴ These generic efforts to encourage

186. *Id.*

187. Douglas Dales, *Absentee Rulings to Curtail Voting*, N.Y. TIMES, Aug. 17, 1952, at 1.

188. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973bb-1).

189. See, e.g., *Absentee G.I. Votes Sought by Republicans*, N.Y. TIMES, Sept. 23, 1968, at 31.

190. *Id.*

191. Associated Press, *European Branch Is Set up by G.O.P.*, N.Y. TIMES, Sept. 2, 1968, at 21.

192. *Both Parties Woo Absentee Voters, Especially the G.I.*, N.Y. TIMES, Oct. 30, 1968, at 28.

193. Douglas Robinson, *Armed Forces Press Efforts to Spur Voting From Vietnam*, HOUS. CHRON., June 5, 1968, at A-4.

194. *Id.*

voting were supported by both parties. Not all efforts, however, were as politically neutral. In some elections, senior military officials attempted to indoctrinate soldiers.¹⁹⁵ For example, Major General Edwin A. Walker, who commanded troops in Germany during the 1960 election, recommended that his soldiers consult the conservative Americans for Constitutional Action voter guide before casting a ballot and gave his troops literature from the John Birch Society.¹⁹⁶ It is clear that with the expansion in voting rights and capabilities, the military became an important constituency courted by both parties.

The logistics of voting had not become any easier, and the idiosyncrasies of state election law and ballot transit issues could still keep overseas citizens and servicemen from being able to vote. Consider the experience of one Peace Corps volunteer:

The Board of Elections of Suffolk County [New York] must truly live in an isolated, automated world if they think mail can travel 14,000 miles by plane from Singapore to Kuching; 150 miles from Kuching to Sibü by plane; sixty miles by Chinese launch from Sibü to Oya; eight miles by bus from Oya to Mukah and a half-mile by bicycle from the post office to me (the last 78 1/2 miles taking twice the time of the first 14,000) and be returned in 12 days The Board of Elections should become more realistic about world mail systems and stop depriving concerned overseas Americans of their right to vote.¹⁹⁷

With almost all Americans eligible to vote, the issue of voting rights for military personnel and individuals living overseas became much less controversial and opposition in Congress declined accordingly. In 1968, Congress expanded voting rights for civilians living overseas by passing two laws amending the Federal Voting Assistance Act that encouraged states to allow U.S. residents living overseas to be able to register and vote.¹⁹⁸ As the legislative history to Public Law 90-343 notes, “[t]housands of Americans temporarily residing abroad and engaged in business, the professions, teaching, the arts, and other walks of life, are denied the right to

195. See, e.g., JAMES BAMFORD, *BODY OF SECRETS: ANATOMY OF THE ULTRA-SECRET NATIONAL SECURITY AGENCY* 66 (2001).

196. *Id.*

197. Stephanie Miranda, Letter to the Editor, *Absentee Ballots*, N.Y. TIMES, Nov. 17, 1968, at E11.

198. See Act of June 18, 1968, Pub. L. No. 90-343, 82 Stat. 180 (repealed 1986) (recommending expanding absentee voting to “all citizens temporarily residing abroad”); Act of June 18, 1968, Pub. L. No. 90-344, 82 Stat. 181 (repealed 1986) (amending 1955 Act to include those living abroad not affiliated with military).

vote because their States of residence do not provide for absentee registration or absentee voting, or both.”¹⁹⁹ Due to corporate globalization and the increase in Americans volunteering to serve their country overseas in civilian capacities, the issue of disenfranchisement was becoming more real for more people. For instance, even individuals serving the government had problems voting. The head of the Peace Corps told Congress that “[o]ne of the major difficulties faced by Peace Corps trainees and volunteers in voting while away from their residences is in complying with State laws requiring oaths when applying for an absentee ballot as well as when marking the ballot.”²⁰⁰ Once again, however, the voluntary nature of the 1968 law left overseas voters at the mercy of their own state’s absentee voting laws.²⁰¹

In 1975, Congress passed Public Law 94-203, the Overseas Citizens Voting Rights Act, which enfranchised the “1.6 million Americans, not counting military personnel, living abroad.”²⁰² An overseas citizen now had the right to vote in the state in which “he was last domiciled immediately prior to his departure from the United States and in which he could have met all qualifications to vote in Federal elections under any present law.”²⁰³ This legislation enfranchised an array of overseas civilians including dependents of military personnel stationed overseas, students and scholars studying abroad, business people and their families, and expatriates.²⁰⁴ According to the Association of Americans Resident Overseas, less than ten percent of overseas Americans were retired; most were business people and their families.²⁰⁵ These overseas Americans were now allowed to vote in federal elections.²⁰⁶ The Act also clarified the varying and confusing state registration and voting requirements that an individual had to meet to vote absentee while overseas and, for the first time since the

199. S. REP. NO. 90-1025 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2064, 2065.

200. H.R. REP. NO. 90-1385 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2067, 2071.

201. *See* § 104, 82 Stat. at 181-82 (stating that Congress is “recommending that each State” allow such voters to use absentee voting procedures).

202. H.R. REP. NO. 94-649(I), at 110 (1975), *reprinted in* 1975 U.S.C.C.A.N. 2358, 2367.

203. Overseas Citizens Voting Rights Act of 1975, Pub. L. No. 94-203, 89 Stat. 1142 § 95(3) (1976) (repealed 1986).

204. *See* H.R. REP. NO. 94-649(I), at 2367 (listing the types of people who would be enfranchised by the legislation).

205. *Id.*

206. *See* 89 Stat. 1142 § 95(3); *see also* H.R. REP. NO. 94-649(I), at 2367-68.

1942 Act, spoke in mandatory terms directing states to comply.²⁰⁷ The law had finally moved past the issues of enfranchisement and now sought to resolve the logistical issues and hurdles facing Americans overseas, both military and non-military, in an effort to facilitate voting via absentee ballot. The 1975 Act, however, was unfortunately not the end of such problems, many of which continue to this day.

V. CURRENT PROBLEMS

The current federal policy regime for overseas voting was established in 1986, when Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), which superseded both the 1955 Federal Voting Assistance Act and the Overseas Citizens Voting Rights Act of 1975.²⁰⁸ This law further eased absentee voting for both military personnel and American citizens residing overseas. It required states to provide for absentee registration and voting by uniformed services and overseas voters²⁰⁹ and established a federal voting assistance program to facilitate absentee registration and voting by eligible voters.²¹⁰ It also provided for a standard Federal Post Card Application (“FPCA”) form that it recommends states allow for registration and application purposes, and provides for postage-free mailing of FPCAs and other balloting materials.²¹¹ Additionally, it stipulated that U.S. citizens over-

207. See, e.g., 89 Stat. 1142 § 95(4) (“Each State shall provide by law for the casing of absentee ballots for Federal elections by all citizens residing outside the United States who—, (1) are entitled to vote in such State pursuant to section 3; (2) have registered or otherwise qualified to vote under subsection (a); and (3) have returned such ballots to the appropriate election official of such State in sufficient time so that such ballot is received by such election official not later than the time of closing of the polls in such State on the day of such election.”).

208. See Registration and Voting by Absent Uniformed Services Voters and Overseas Voters in Elections for Federal Office, 42 U.S.C. § 1973ff to ff-6 (2006).

209. See *id.* § 1973ff-1(a) (“In general. Each State shall — (1) permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office; (2) accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election.”).

210. See *id.* § 1973ff(b)(5) (stating that the presidential designee shall “compile and distribute (A) descriptive material on State absentee registration and voting procedures, and (B) to the extent practicable, facts relating to specific elections, including dates, offices involved, and the text of ballot questions”).

211. See *id.* § 1973ff(b)(2) (stating that the Presidential designee shall “prescribe an official post card form, containing both an absentee voter registration application and

seas may continue to vote for federal office even if they have no current address in the United States.²¹² Properly registered military and overseas voters are also allowed to submit a federal write-in absentee ballot for federal offices in a general election if they did not receive in a timely manner the state absentee ballot they requested.²¹³ According to the U.S. General Accountability Office (“GAO”), “[t]he act covers approximately 6.1 million [American] citizens, including 2.7 million military members and their dependents.”²¹⁴

As with previous military voting laws, some discretion is still left to the states under UOCAVA, and variations in registration requirements, deadlines for submitting ballots, and tight time frames between when ballots are sent to military voters and when they are due to be returned still cause problems.²¹⁵ These problems were illustrated by the 2000 election.²¹⁶ In Florida, issues such as ballot transit times continued to disenfranchise voters. For instance, the *New York Times* conducted an independent examination of late overseas absentee ballots received in the 2000 Florida election.²¹⁷ These late ballots were received after November 7, 2000, but were ultimately examined by canvassing boards between November 17, 2000 and November 26, 2000.²¹⁸ The researchers examined 3,704 of these overseas ballots received after November 7, of which 2,504 were accepted and counted by canvassing boards.²¹⁹ Thus, nearly

an absentee ballot application, for use by the States as required under section 1973ff-1(4) of this title”).

212. See *id.* § 1973ff-6(5)(B) (defining an “overseas voter” as “a person who resides outside the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States”).

213. See *id.* § 1973ff-2(a) (“The Presidential designee shall prescribe a Federal write-in absentee ballot (including a secrecy envelope and mailing envelope for such ballot) for use in general elections for Federal office by absent uniformed services voters and overseas voters who make timely application for, and do not receive, States, absentee ballots.”); see also COLEMAN, *supra* note 27, at 2-3 (describing procedures in UOCAVA).

214. See Walker, *supra* note 39, at 1.

215. See *id.* at 11 (noting the variation in state election procedures, including some states requiring receipt of voted ballot the day before the election, while some accept them up to fifteen days after the election).

216. For further discussion of the Florida 2000 court cases, see *infra* notes 249-56 and accompanying text.

217. See Barstow & Van Natta, *supra* note 5 (noting the “late overseas absentee ballots: Bush: 1,575; Gore: 836, Leader and margin (pct. of all votes): Bush by 739”).

218. *Id.*; see also generally Imai & King, *supra* note 5.

219. See Barstow & Van Natta, *supra* note 5 (stating that 680 late overseas absentee ballots with flaws were accepted and 1,824 late overseas absentee ballots without flaws were accepted).

33% of these overseas ballots received after November 7, 2000 were invalidated for various reasons.²²⁰ The researchers then examined the 2,504 overseas absentee ballots that were accepted by the canvassing boards and included in county tabulations.²²¹ Based on the Florida regulations for what constitutes an acceptable overseas absentee ballot, 680 (27%) of the accepted late ballots were legally flawed.²²² If these 680 ballots had not been accepted and counted (as they would not have been under the strict application of Florida law), a full 51% of the late overseas absentee ballots would have been rejected in the 2000 Florida election.²²³ The only reason late ballots were counted at all was because, as discussed in greater detail below, there had been a previous problem with overseas voting in Florida resulting from the tight time frame between sending out ballots and the deadline for their return.²²⁴ This failure of UOCAVA to directly address such issues with solutions, such as mandatory lead-times that are sufficient for sending out ballots or expanded deadlines for their receipt, leads to state-level difficulties resulting from incompatible state election procedures and regulations.²²⁵

The passage of the Help America Vote Act of 2002 (“HAVA”)²²⁶ and the National Defense Authorization Act for Fiscal Year 2002²²⁷ made six major changes to the UOCAVA process in an effort to improve the ability of these voters to vote. First, states are required to designate a single state office to serve UOCAVA voters in the registration and ballot application process.²²⁸ Second, states

220. *Id.*

221. *See id.* (stating that 680 late overseas absentee ballots with flaws were accepted and 1,824 late overseas absentee ballots without flaws were accepted).

222. *Id.*

223. *Id.*

224. *See infra* notes 249-60 and accompanying text (discussing legal cases concerning Florida ballot counting).

225. *See infra* notes 254-56 and accompanying text (discussing the ramifications of relatively ad hoc tabulation procedures during the Florida 2000 presidential election recount).

226. Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at scattered sections of 42 U.S.C.).

227. National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001).

228. *See* 42 U.S.C. § 1973ff-1(b)(1) (2006) (“Each State shall designate a single office which shall be responsible for providing information regarding voter registration procedures and absentee ballot procedures to be used by absent uniformed services voters and overseas voters with respect to elections for Federal office (including procedures relating to the use of the Federal write-in absentee ballot) to all absent uniformed services voters and overseas voters who wish to register to vote or vote in any jurisdiction in the State.”).

must collect and publish statistics on UOCAVA registration and balloting.²²⁹ Third, a single absentee ballot request is now valid for two federal elections.²³⁰ Fourth, there is a standard oath for all voting documents promulgated by the Federal Voting Assistance Program (“FVAP”), which oversees UOCAVA voting.²³¹ Fifth, states must accept all absentee ballot requests, even if they are received before the state typically accepts them.²³² Finally, states must notify UOCAVA voters if their registration application is rejected.²³³

Nevertheless, it is clear that UOCAVA voters still face serious problems in voting because of logistical difficulties and variation among state laws. In 2001, the GAO found the UOCAVA voting process very cumbersome, resulting in the disenfranchisement of

229. *See id.* § 1973ff-1(c) (“Not later than 90 days after the date of each regularly scheduled general election for Federal office, each State and unit of local government which administered the election shall (through the State, in the case of a unit of local government) submit a report to the Election Assistance Commission (established under the Help America Vote Act of 2002) on the combined number of absentee ballots transmitted to absent uniformed services voters and overseas voters for the election and the combined number of such ballots which were returned by such voters and cast in the election, and shall make such report available to the general public.”).

230. *See* Pub. L. No. 107-107 § 1606(b) (“If a State accepts and processes an official post card form (prescribed under section 101) submitted by an absent uniformed services voter or overseas voter for simultaneous voter registration and absentee ballot application (in accordance with section 102(a)(4)) and the voter requests that the application be considered an application for an absentee ballot for each subsequent election for Federal office held in the State during that year, the State shall provide an absentee ballot to the voter for each subsequent election for Federal office held in the State during that year.”); *see also* Pub. L. No. 107-252 § 704 (codified as amended at 42 U.S.C. § 1973ff-3(a)) (striking “during that year” from the National Defense Authorization Act (“NDAA”) amendment and replacing it with “through the next 2 regularly scheduled general elections for Federal office (including any runoff elections which may occur as a result of the outcome of such general elections), the State shall provide an absentee ballot to the voter for each such subsequent election”).

231. *See* Pub. L. No. 107-252 § 705 (codified as amended at 42 U.S.C. § 1973ff-1(a)(5)) (stating that “if the State requires an oath or affirmation to accompany any document under this title, use the standard oath prescribed by the Presidential designee”).

232. *See id.* § 706 (codified as amended at 42 U.S.C. § 1973ff-3(e)) (“A State may not refuse to accept or process, with respect to any election for Federal office, any otherwise valid voter registration application or absentee ballot application (including the postcard form prescribed under section 1973ff of this title) submitted by an absent uniformed services voter during a year on the grounds that the voter submitted the application before the first date on which the State otherwise accepts or processes such applications for that year submitted by absentee voters who are not members of the uniformed services.”).

233. *See id.* § 706 (codified as amended at 42 U.S.C. § 1973ff-1(d)) (“With respect to each absent uniformed services voter and each overseas voter who submits a voter registration application or an absentee ballot request, if the State rejects the application or request, the State shall provide the voter with the reasons for the rejection.”).

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many voters.²³⁴ The paper-based process is also a source of many problems. As the GAO noted,

[M]ilitary and overseas voters do not always complete absentee voting requirements or use federal forms correctly. The basic steps that absentee voters must take to register and request an absentee ballot are similar for all states. Nevertheless, absentee voting schedules and requirements vary from state to state County officials said that problems in processing absentee voting applications arise primarily because voters do not fill in the forms correctly or do not begin the voting process early enough to complete the multiple steps they must take.²³⁵

Ballot transit times are another important potential problem. In its study of UOCAVA voting, the GAO also found that transit times for first class mail can range from as little as five days to as much as a month.²³⁶ A survey by the GAO found that almost two-thirds of all disqualified absentee ballots were rejected because election officials received them after the official deadline.²³⁷ The report also noted that there are special types of mail transit, such as transit to naval vessels underway, that are difficult to service.²³⁸ For example, mail transit averages seven days for eighty percent of mail.²³⁹ Remote areas and forward deployed locations, however, such as Bosnia or Kosovo, may take an average of nine days.²⁴⁰ In the legislative history for the UOCAVA law, Congress documents these and other problems.²⁴¹

234. See generally U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-01-1026, ELECTIONS: VOTING ASSISTANCE TO MILITARY AND OVERSEAS CITIZENS SHOULD BE IMPROVED (2001), available at <http://www.gao.gov/new.items/d011026.pdf>; see also OFFICE OF INSPECTOR GEN., DEP'T OF DEF., REPORT NO. D-2003-072, DoD COMPLIANCE WITH THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT ii (2003), available at <http://www.dodig.mil/audit/reports/fy03/03-072.pdf> (finding that voter assistance programs were "partially effective" in six of ten locations inspected and "ineffective" in four).

235. See U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-01-1026, *supra* note 234, at 40-41.

236. *Id.* at 73.

237. *Id.* at 6-7.

238. *Id.* at 48 (describing difficulties encountered when using mail transit to transport absentee votes).

239. See *id.* at 72 (stating that the Department of Defense's standard for mail delivery is a transit time of seven days for eighty percent of first class letter mail).

240. *Id.*

241. See HANS A. VON SPAKOVSKY, THE FED. SOC'Y FOR LAW AND PUB. POLICY STUDIES, VOTING BY MILITARY PERSONNEL AND OVERSEAS CITIZENS: THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT 5 (Jan. 2005), available at http://www.fec.gov/members/von_Spakovsky/vonSpakovsky_articles.shtml (follow pdf hyperlink for "Voting by Military Personnel and Overseas Citizens: the Uniformed and

More recently, a 2004 GAO study found that ballot transit times to Iraq fell within the Army standard of twelve to eighteen days for prograde mail (mail sent from the United States into Iraq) for every month between February, 2003 and September, 2003, but that this “standard” hid the fact that twenty-five percent of test letters were delivered more than eighteen days after the date mailed.²⁴² Moreover, the delivery time for retrograde mail (mail from Iraq to the United States) was outside the twelve to eighteen day delivery standard for two of the six months of the evaluation.²⁴³ Thus, under most circumstances it was difficult, if not impossible in many cases, for mail to be sent and returned from Iraq in less than thirty days, a typical deadline lead-time for absentee ballots to be sent to prospective voters. At best, it provided only a very short window for personnel to individually receive their mail, properly fill out the documentation, and then be in a position to place it in return mail. Congress, in its examination of the issue during the UOCAVA debates, indicated that to overcome such problems, ballots should be mailed out at least forty-five days prior to the election to ensure enough time for their return.²⁴⁴

Such problems not only affect the ballot itself but the registration and request for ballots that must be sent in order to receive a ballot in the first place. As stated above, UOCAVA authorizes military and overseas voters to use the Federal Post Card Application for registration and absentee ballot requests.²⁴⁵ Service members appear to have difficulty, however, with the post cards. The

Overseas Citizens Absentee Voting Act”); see also H.R. REP. NO. 99-765, at 10-11 (1986) (“Mail delivery is a problem for overseas voters. Members of the military may be in locations where mail service is sporadic, or they may be away for days or weeks at a time on temporary duty or on maneuvers. Among civilians overseas, missionaries and Peace Corps Volunteers in particular often work in remote areas where mail delivery is slow. Citizens working on oil rigs or on remote construction sites regularly encounter mail delays. Based on surveys of the U.S. Postal Service and of military postal authorities, ballots should be mailed to overseas addresses at least 45 days prior to an election in order to ensure adequate time for a ballot to reach a voter and be returned.”).

242. U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-04-484, OPERATION IRAQI FREEDOM: LONG-STANDING PROBLEMS HAMPERING MAIL DELIVERY NEED TO BE RESOLVED 13 (2004), available at <http://www.gao.gov/new.items/d04484.pdf>.

243. *Id.*

244. See VON SPAKOVSKY, *supra* note 241, at 5 (quoting U.S. ELECTION ASSISTANCE COMM’N, REPORT, BEST PRACTICES FOR FACILITATING VOTING BY U.S. CITIZENS COVERED BY THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT (2004), available at <http://www.eac.gov/docs/UOCAVA%20Best%20Practices%20Full%20Report.doc>).

245. 42 U.S.C. § 1973ff(b)(2) (2006).

most recent Department of Defense survey of service members concerning voting found these troubling results:

The Federal Post Card Application (FPCA), SF 76, is used to register to vote and request an absentee ballot. However, only twenty-five percent of respondents were aware of the FPCA. Absentee voters must also receive the FPCA in a timely manner to properly register and be eligible to vote. Only twenty-four percent had received SF 76 by the January 15 deadline. In addition, only twenty-five percent of the respondents were aware that the Federal Write-in Absentee Ballot (FWAB), SF 186, is a backup ballot that can be used if they did not receive the regular absentee ballot. Only eighteen percent were aware of the FVAP Web site, and only fourteen percent knew of the Service or component voting Web site. Potentially, greater use and access to voting Web sites could minimize the need for physical distribution of SF 76s.²⁴⁶

The proposed solution to the transit problem is clearly not serving its function or is at least failing to meet its full potential.

These difficulties are exacerbated by the local election laws and schedules established by states, often by statute, that dictate when primary elections occur, when ballots can be produced, deadlines for mailing ballots out to voters, and cut-off dates for the receipt and counting of absentee ballots.²⁴⁷ Indeed, many of these restrictions come into direct conflict with federal statutes intended to protect military and overseas voters and result in the U.S. Department of Justice ("DOJ") initiating litigation against states and localities seeking remedies that will help overcome the ballot transit

246. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., REPORT NO. IE-2006-001, EVALUATION OF THE VOTING ASSISTANCE PROGRAM 4-5 (2006), available at [http://www.dodig.osd.mil/Inspections/IE/Reports/FVAP%20Final%20Rpt%204-5-2006%20\(1\).pdf](http://www.dodig.osd.mil/Inspections/IE/Reports/FVAP%20Final%20Rpt%204-5-2006%20(1).pdf).

247. Compare, e.g., WIS. STAT. ANN. § 6.221(3)(b) (West 2006) ("At the general election, a ballot that is cast under section 6.22 by an elector who is a military elector, that is received by mail from the U.S. postal service, and that is postmarked no later than election day shall be counted as provided in this section if it is received by a municipal clerk no later than 5 p.m. on the 10th day after the election."), with COLO. REV. STAT. § 1-8-303 (2006) ("The designated election official shall continue to deliver any envelopes containing absentee ballots that may be received thereafter up to and including 7 p.m. on election day."), and MISS. CODE ANN. § 23-15-637 (West 2007) ("Absentee ballots received by mail . . . must be received by the registrar by 5:00 p.m. on the date preceding the election; any received after such time shall be handled as provided in [s]ection 23-15-647 and shall not be counted."). As can be seen from these statutes, deadlines for the receipt of voted absentee ballots can vary widely from the day before the election in Mississippi, to the day of election in Colorado (and many other states), to ten days after the election so long as it is postmarked by Election Day in Wisconsin.

problem. From 1988 through 2004, the DOJ brought more than twenty enforcement actions under UOCAVA.²⁴⁸ A discussion of a few of these cases will highlight the difficulties continually at issue between state election officials and federal officials seeking to guarantee military and overseas voters the ability to receive ballots in a timely fashion.

The most famous instance of this type of litigation occurred even before the current UOCAVA statutory framework was in place. In 1980, the United States sued the State of Florida alleging that the late scheduling of primary elections, resulting in the mailing of ballots at the earliest twenty days before the general election and in some cases only a few days before, violated the Overseas Citizens Voting Rights Act because the late scheduling made it impossible for such voters to return them before the statutory deadline of 7 p.m. on Election Day.²⁴⁹ The court provided injunctive relief for the 1980 election mandating that ballots received within ten days of Election Day must be counted.²⁵⁰ As the 1982 election approached, Florida and the United States entered into a consent decree that allowed ballots to again be accepted for ten days after the election and also required that absentee ballots be sent out thirty-five days prior to the election.²⁵¹ The court also required the state to submit a plan of compliance showing that it had enacted sufficient measures to ensure that overseas voters had a reasonable opportunity to receive and return their ballots.²⁵² In 1984, when the Florida Legislature failed to act to provide such measures to the satisfaction of the court, the court ordered Florida to implement an administrative rule, ultimately enacted as Florida Administrative Code section 1S-2.013, containing the thirty-five-day advance mailing requirement and the ten-day extension for receipt of ballots after Election Day.²⁵³ Florida operated with an administrative rule that directly contradicted a state statute for sixteen years without much fanfare.

In 2000, after the statutorily mandated 7 p.m. Election Day deadline, Florida received 2,411 overseas ballots which, if counted, gave Bush/Cheney a 537 vote edge in the state and, if rejected,

248. See VON SPAKOVSKY, *supra* note 241, at 5.

249. See *id.* at 7 (citing *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1321 (N.D. Fla. 2000), *aff'd*, 235 F.3d 578 (11th Cir. 2000)).

250. *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1321-22 (N.D. Fla. 2000), *aff'd*, 235 F.3d 578 (11th Cir. 2000).

251. *Id.* at 1322; see also VON SPAKOVSKY, *supra* note 241, at 7.

252. *Harris*, 122 F. Supp. 2d at 1322.

253. *Id.* at 1322-23.

gave Gore/Lieberman a 202 vote edge.²⁵⁴ The U.S. District Court for the Northern District of Florida therefore had to determine whether a statute or administrative rule was the applicable standard for the counting of absentee ballots. The court contradicted precedent and ruled that the administrative rule superseded the directly contradictory statute because the rule was mandated by a federal court as part of the enforcement of federal overseas and military voting statutes.²⁵⁵ The resolution of a logistical problem with the timely mailing of overseas ballots nearly twenty years prior had a dramatic and decisive effect on the election of a president.²⁵⁶

This same Florida administrative rule providing for an extension for the return of UOCAVA ballots was again attacked following the 2004 presidential election, this time by the American Civil Liberties Union (“ACLU”) seeking to expand its protections to all absentee voters.²⁵⁷ The ACLU claimed that failing to provide the ten-day extension for receipt of absentee ballots to all absentee voters violated the Civil Rights Act of 1957 and the Equal Protection Clause of the Fourteenth Amendment.²⁵⁸ The DOJ argued that overseas and military voters, because of the logistical issues involved with mailing such ballots recognized by Congress in passing the federal statutes, were legitimately distinguished from other absentee voters.²⁵⁹ The court dismissed the ACLU claim.²⁶⁰

One would think with such a high-profile and consequential incident as the 2000 election controversy that states would take notice of the logistical problems and legal ramifications of the issue of

254. *Id.* at 1320.

255. *Id.* at 1323-24.

256. *But see* Bush v. Hillsborough County Canvassing Bd., 123 F. Supp. 2d 1305, 1315-16 (N.D. Fla. 2000) (holding that overseas and military ballots that did not have APO, FPO or foreign postmarks and for which no application was on record must be counted pursuant to UOCAVA and other federal protections).

257. *See generally* Complaint, Friedman v. Snipes, 345 F. Supp. 2d 1356 (S.D. Fla. 2004) (No. 04-22787), available at <http://www.aclu.org/FilesPDFs/fl%20absentee%20final%20complaint.pdf>

258. *Friedman*, 345 F. Supp. 2d at 1358.

259. *See* De La Rosa v. United States, 32 F.3d 8, 11 (1st Cir. 1994) (ruling that distinction between those living abroad and those who do not is not a suspect class and was supportable on a reasonable basis); *see also* Romeu v. Cohen, 121 F. Supp. 2d 264, 285 (S.D.N.Y. 2000), *aff'd*, 265 F.3d 118 (2d Cir. 2001) (same); Howard v. State Administrative Bd. of Election Laws, 976 F. Supp. 348, 352 (D. Md. 1996); VON SPAKOVSKY, *supra* note 241, at 7; Letter from Sheldon T. Bradshaw, Principal Deputy Assistant Attorney Gen., to Alan S. Gold, U.S. Dist. Court Judge (Nov. 9, 2004), available at http://www.usdoj.gov/crt/voting/misc/gold_ltr.htm.

260. *See* VON SPAKOVSKY, *supra* note 241, at 7.

military and overseas ballots and endeavor to avoid such situations. This was not the case, however, and in 2004 the DOJ filed two enforcement actions, one in Georgia and the other in Pennsylvania, pertaining to the late mailing of absentee ballots by local election officials.²⁶¹ As discussed in a GAO report,

Georgia state law requires counties to have absentee ballots on hand 45 days before a general election. Georgia missed the September 20, 2002, deadline for the November 5, 2002, general election because of the compressed election schedule in 2002. The 45-day deadline was set to comply with federal mandates to make it easier for U. S. military personnel stationed outside the United States to vote. Georgia had compressed its 2002 primary and runoff election schedules such that the runoff was held only 49 days before the November 5 general election. This precluded the printing of the general election ballot in time for the mailing deadline required under state law. Georgia election officials had contacted FVAP during the first week of October regarding the state's compliance with the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA). Catoosa County ballots omitted the names of the Republican candidate for the U.S. Senate and the Republican gubernatorial candidate from the ballot. An allegation was made that this, among other absentee ballot irregularities, violated UOCAVA because the correct ballots, even if sent at the time this concern was raised on October 16, 2002, would not be received in time. Georgia's Secretary of State asked DOJ to bring suit against the state to extend the deadline for receipt of military and other absentee ballots.²⁶²

Despite this prior instance, Georgia again had a problem with mailing absentee ballots in 2004, and the DOJ again brought suit to force an extension in the deadline for receipt of overseas and military ballots in the 2004 election.²⁶³ The court granted a three-day extension in the deadline as well as "accelerated means for the transmission and return of [UOCAVA] voters' absentee ballots, including facsimile, email, and express mail at public expense."²⁶⁴ The case was ultimately resolved in 2005 by a Memorandum of Understanding that recognized that the Georgia General Assembly

261. *See id.* at 7-8.

262. U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-04-1041R, DEPARTMENT OF JUSTICE'S ACTIVITIES TO ADDRESS PAST ELECTION-RELATED VOTING IRREGULARITIES (2004), *available at* <http://www.gao.gov/htext/d041041r.html>.

263. *See* Memorandum of Understanding Between Ga. and Sec'y of State of Ga. and the U.S., *United States v. Georgia* (N.D. Ga. July 25, 2005) (No. 1:04-CV-2040), *available at* http://www.usdoj.gov/crt/voting/misc/ga_uocava2.htm.

264. *Id.*

had taken sufficient steps to ensure long-term compliance with UOCAVA.²⁶⁵

In Pennsylvania, similar litigation was required when multiple county election boards failed to send out absentee ballots early enough to comply with UOCAVA requirements.²⁶⁶ The court provided injunctive relief, extending the deadline for receipt of ballots in the primary election statutorily set at 5:00 p.m. on the Friday before Election Day, for twenty-one days and providing for overnight delivery of ballots at state expense.²⁶⁷ The judge specifically denied the DOJ's request for relief to use technological means such as facsimile and email even though it conceded that such procedures "'make sense' in this electronic age" because it "would involve this Court devising and superimposing it's [sic] own election scheme on a complex legislatively sanctioned system spread across sixty seven diverse counties."²⁶⁸ This statement encapsulates much of the tension between the federal government's desire for ensuring military and overseas voters a chance to vote and the localized control over the mechanisms of voting.

Later in the election year, the same case was revitalized with respect to the general election under circumstances that show that it is not always the local control and scheduling of elections that can cause problems for military voters. Beginning on August 24, 2004, Pennsylvania began issuing absentee ballots to overseas and military voters, ultimately sending out a total of 26,739 ballots.²⁶⁹ The problem arose when the eligibility of Ralph Nader to appear on the Pennsylvania ballot was challenged, Nader was ordered removed from the ballot, and was then allowed back on only to be removed again as the case wound its way up the appeals process.²⁷⁰ As a result, thousands of overseas and military voters received ballots that were different than the one officially certified as correct.²⁷¹ The federal government again intervened and sought relief in the form of resending the ballots through electronic means or express

265. *Id.*

266. *See* Order, *United States v. Commonwealth* (M.D. Penn. Apr. 16, 2004) (No. 1:CV-04-830), *available at* http://www.dos.state.pa.us/dos/lib/dos/20/voting_case_tro.pdf.

267. *Id.* at 5-6.

268. *Id.* at 4-5.

269. *See* Memorandum and Order, *United States v. Commonwealth*, 2004 WL 2384999 (M.D. Penn. Oct. 20, 2004) (No. 1:CV-04-830), *available at* <http://www.pamd.uscourts.gov/opinions/kane/04v0830.pdf>.

270. *Id.* at 1.

271. *Id.* at 1-3.

mailing, and extension of the deadline for processing the ballots.²⁷² The district court denied such relief on the grounds that doing so would “harm the Pennsylvania election system and the public at large by undermining the integrity and efficiency of Pennsylvania elections,”²⁷³ and that “the ‘remedies’ proposed by the Government invite unpredictability to an otherwise orderly and time tested elections process.”²⁷⁴ The court failed to explain why this was the case.²⁷⁵ The court could be faulted for not taking advantage of all possible means of ensuring the timely transmission of votes from military and other overseas voters, but the fault truly lies at the feet of Congress as it continues to maintain the dual-authority nature of federal elections. The court was duly concerned about treading too heavily on the state election procedures and laws that Congress allows to dictate deadlines for federal ballots.

Such battles between state and federal authorities have not ended, and the U.S. government has filed several more lawsuits during the most recent Congressional election regarding the mailing of overseas ballots and deadlines for receipt from military voters. In 2006, the DOJ brought actions and obtained either injunctive relief or stipulated agreements from the states of Alabama,²⁷⁶ South Carolina,²⁷⁷ Connecticut,²⁷⁸ and North Carolina.²⁷⁹ Despite years of efforts and multiple litigations, states thus continue to give short shrift to overseas and military voters in how they handle election deadlines, ballot transmission, and absentee deadlines.

These cases illustrate the continued tension and interaction between the state and federal governments concerning military and overseas ballots. The federal government is waging a continuing struggle to ensure that such voters have enough time to receive their ballots in the mail and return them for inclusion in the official

272. *Id.* at 8.

273. *Id.* at 8-9.

274. *Id.* at 10.

275. *See id.*

276. *See* Press Release, U.S. Dep’t of Justice, Justice Department Announces Resolutions to Protect Rights of Military and Overseas Citizens to Vote in Federal Primary Elections in Alabama and South Carolina (June 8, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/June/06_crt_354.html

277. *Id.*

278. *See* Stipulated Agreement, *United States v. State* (D. Conn. Aug. 2, 2006) (No. 3:06-cv-1192), http://www.usdoj.gov/crt/voting/misc/ct_cd.htm.

279. *See* Consent Decree, *United States v. State* (E.D.N.C. Mar. 20, 2006) (No. 5:06-cv-00118-H), http://www.usdoj.gov/crt/voting/misc/nc_uocava_cd.htm.

tally within the context of state-mandated deadlines and primary schedules. Congress, however, has simply been unwilling to go the extra step to ensure that such rights are not effectively hollow for many military voters as a result of such deadlines.

As stated earlier, the U.S. Constitution authorizes Congress to use its plenary power and take whatever steps it deems necessary in conducting federal elections.²⁸⁰ Congress could simply dictate to states the deadlines for sending, receiving, and counting federal ballots. The federal government's Election Assistance Commission recommended in 2004 that forty-five days be the minimum requirement for total transmission time of ballots from election officials to overseas voters and their return.²⁸¹ Table 2 shows, however, that as of late 2004 only thirty states (plus the District of Columbia) had laws requiring that ballots be sent overseas at least forty-five days prior to the deadline for their return. Twenty states failed to meet the recommended time-frame for facilitating military and overseas voting.²⁸²

TABLE 2. STATE BALLOT TRANSIT DEADLINES AND TRANSMISSION METHODS²⁸³

| | 45 Day Ballot Transit Time | Mail Ballots 30 or more days prior to elections | Permit Delivery of Blank Ballots to Voters by Facsimile | Permit Return of Voted Ballot by Facsimile | Permit Delivery of Blank Ballots by Email |
|----------|-------------------------------------|---|--|--|---|
| Alabama | | X | | | |
| Alaska | | | X | X | |
| Arkansas | | | | | |

280. *See supra* Part III.

281. *See* U.S. ELECTION ASSISTANCE COMM'N, REPORT: BEST PRACTICES FOR FACILITATING VOTING BY U.S. CITIZENS COVERED BY THE UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT 5 (2004), available at <http://www.eac.gov/docs/UOCAVA%20Best%20Practices%20Full%20Report.doc> (stating that states should "[m]ail absentee ballots at least 45 days prior to the deadline for receipt of voted absentee ballots").

282. *See infra* tbl.2. Even when there was such a requirement, as the case from Pennsylvania discussed above demonstrates, there was not always compliance and other issues (such as candidates being taken off, put back on, and taken off again) caused problems. *See* Memorandum and Order, *United States v. Commonwealth*, 2004 WL 2384999 (M.D. Penn. Oct. 20, 2004) (No. 1:CV-04-830), available at <http://www.pamd.uscourts.gov/opinions/kane/04v0830.pdf>.

283. Adapted from U.S. ELECTION ASSISTANCE COMM'N, *supra* note 281, at Exhibit 2.

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| | 45 Day Ballot Transit Time | Mail Ballots 30 or more days prior to elections | Permit Delivery of Blank Ballots to Voters by Facsimile | Permit Return of Voted Ballot by Facsimile | Permit Delivery of Blank Ballots by Email |
|----------------------|-------------------------------------|---|--|--|---|
| California | | | X | | |
| Colorado | | X | X | X | |
| Connecticut | X | X | | | |
| Delaware | X | | | | |
| District of Columbia | X | X | X | X | |
| Florida | X | X | X | X | X |
| Georgia | X | X | | | |
| Hawaii | | X | X | X | |
| Idaho | X | X | X | | |
| Illinois | X | X | | | X |
| Indiana | X | X | X | X | |
| Iowa | X | X | | | |
| Kansas | X | X | X | X | |
| Kentucky | X | X | X | | |
| Louisiana | X | X | X | X | X |
| Maine | X | X | X | X | |
| Maryland | X | X | X | | |
| Massachusetts | X | | | | |
| Michigan | X | X | | | |
| Minnesota | | X | | | |
| Mississippi | X | X | X | X | X |
| Missouri | | X | | | |
| Montana | | X | X | X | |
| Nebraska | X | X | | | |
| Nevada | | X | X | | |
| New Hampshire | | X | | | |
| New Jersey | | X | X | X | |
| New Mexico | X | X | X | X | |
| New York | X | X | | | |
| North Carolina | X | X | X | X | |
| North Dakota | | X | X | X | |
| Ohio | X | X | X | | |
| Oklahoma | | X | X | X | |
| Oregon | X | X | X | | |
| Pennsylvania | X | X | X | | |
| Puerto Rico | X | X | | | |
| Rhode Island | X | X | X | X | |
| South Carolina | X | X | X | X | |

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| | 45 Day Ballot Transit Time | Mail Ballots 30 or more days prior to elections | Permit Delivery of Blank Ballots to Voters by Facsimile | Permit Return of Voted Ballot by Facsimile | Permit Delivery of Blank Ballots by Email |
|---------------|-------------------------------------|---|--|--|---|
| South Dakota | | X | | | |
| Tennessee | X | X | | | |
| Texas | X | X | | X | |
| Utah | | X | X | X | |
| Vermont | | X | X | | |
| Virginia | X | X | | | X |
| Washington | | | X | X | X |
| West Virginia | X | X | | | |
| Wisconsin | | X | X | | |
| Wyoming | | X | | | |
| TOTALS | 31 | 47 | 31 | 22 | 6 |

This disparity could be eliminated if Congress mandated the time-frames for absentee voting in federal elections instead of leaving it up to the individual states, relying on the DOJ to individually, and as a result inefficiently, challenge every instance in which it deems a state out of compliance with the general terms of UOCAVA. Congress' failure to do so leaves discretion in the hands of both state officials and the enforcement division of the federal executive branch. Military and other overseas voters are caught in the middle. Congress could create a much simpler and more unified system that ensures that state discretion does not effectively disenfranchise such voters. No such effort appears likely or even within the current contemplation of Congress, given that the latest attempt to address problems with overseas voting, HAVA, again allowed significant state discretion.²⁸⁴

Absent such an endeavor, technology may ultimately provide the solutions to such dilemmas by eliminating the problem of transit time altogether. Technology, however, is not a panacea and, despite advances, has yet to provide a complete resolution to the continued difficulties faced by military and absentee voters.²⁸⁵

284. See Help America Vote Act of 2002 (HAVA), Pub. L. No. 107-252, 116 Stat. 1666 Title VII (codified as amended at scattered sections of 42 U.S.C.) (failing to mandate procedures for states beyond requiring acceptance of postcard application and federal write-in ballot, thereby preserving discretion by states in determining deadlines for absentee voting).

285. See *infra* Part VI.

VI. FROM PROCEDURES TO TECHNOLOGY

HAVA's six legal changes to UOCAVA voting discussed above are procedurally focused, attempting to make the existing by-mail process work more efficiently.²⁸⁶ As shown above, however, the primary problem with UOCAVA voting is ballot transit time, something that can only be improved by improving mail delivery, which is clearly outside the province of election reforms.²⁸⁷ So, in 2001, Congress passed a specific provision, as part of the National Defense Authorization Act for Fiscal Year 2002 ("2002 NDAA"), concerning the use of technology to improve UOCAVA voting by moving the ballot transit issue away from the mail and into cyberspace.²⁸⁸ Specifically, section 1604(a)(1) of the 2002 NDAA states:

[T]he Secretary of Defense shall carry out a demonstration project under which absent uniformed services voters are permitted to cast ballots in the regularly scheduled general election for Federal office for November 2002 through an electronic voting system. The project shall be carried out with participation of sufficient numbers of absent uniformed services voters so that the results are statistically relevant.²⁸⁹

This requirement was designed to experiment using technology, as opposed to merely procedural improvements, as a means to solve the problems UOCAVA voters face in receiving and returning absentee ballots within the time restraints of state-run federal elections. The desire to find technological solutions to the UOCAVA problem recognizes that the continued reliance on state and local actors, variations in state election laws, and limitations on addressing ballot transit hinder UOCAVA voting. Technology can allow the local election official and the voter to transmit information immediately, thereby solving one of the critical roadblocks in UOCAVA voting.

In recent years, it has become clear that technology may play an important role in addressing the issues associated with UOCAVA voting. FVAP, which oversees UOCAVA voting, is uniquely situated in the federal government to promote the use of technology to

286. *See generally* 116 Stat. 1666.

287. *See generally* Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (codified as amended in scattered sections of 42 U.S.C., 39 U.S.C., 18 U.S.C.).

288. *See* Pub. L. No. 107-107, 115 Stat. 1012 (2001) (codified as amended as Electronic Voting Demonstration Project, 42 U.S.C. § 1973ff).

289. *Id.* § 1604(a)(1).

facilitate voting.²⁹⁰ The voters with which FVAP are primarily identified, military voters, are a popular population in political circles to serve, leading to little controversy in efforts to improve the military's ability to vote. Additionally, by being housed in the Department of Defense, FVAP is able to leverage the budget and technological inclination of the Department to its advantage.

FVAP, unlike Congress, lacks the power to coerce local election officials into adopting new technologies, nor can it bypass local election officials to facilitate UOCAVA voting.²⁹¹ Instead, FVAP can support and promote technological innovation by the local governments that serve UOCAVA voters.²⁹² This process of identifying and supporting "champions" is common in voluntary technology adoptions; the United Kingdom uses this strategy to test electronic voting in local elections.²⁹³ Champions tend to be leaders in their field who want to use new technologies and have the capacity—including personnel, experience, and resources—to make pilot adoptions work.²⁹⁴ Without the power to coerce involvement, champions are often the only ones who are likely to want to participate; FVAP, therefore, often works with only champions who adopt their own innovations.

One problem with this use of champions is the difficulty in knowing how well the program will work in other jurisdictions. Innovation helps voters in the most progressive communities cast ballots while others are left behind. The history of the adoption of innovative solutions to serve UOCAVA voters, therefore, appears in many ways similar to the historical issues surrounding procedural reforms as it is both piecemeal and, to date, ineffective at addressing the problems faced by voters overseas. Nonetheless, over the last fourteen years, FVAP has worked to promote the use of new technologies that address the transit time and voter error problems through fax machines, Internet, and email voting.

290. See FED. VOTING ASSISTANCE PROGRAM, U.S. DEP'T OF DEF., ABSENTEE VOTING ASSISTANCE TO UNIFORMED SERVICES MEMBERS AND OVERSEAS CITIZENS, <http://www.fvap.gov> (last visited Apr. 9, 2007).

291. See Federal Voting Assistance Act of 1955, ch. 656, 69 Stat. 584 (repealed 1986).

292. *Id.*

293. See generally LAWRENCE PRATCHETT, THE IMPLEMENTATION OF ELECTRONIC VOTING IN THE UK (2002), available at <http://www.dca.gov.uk/elections/e-voting/pdf/e-voting.pdf>.

294. For examples of this from the private sector, see generally RICHARD FOSTER, INNOVATION: THE ATTACKER'S ADVANTAGE (1986); see also ROSABETH MOSS KANTER, THE CHANGE MASTERS: INNOVATIONS FOR PRODUCTIVITY IN THE AMERICAN CORPORATION (1983).

A. Fax Balloting

The Gulf War and the military buildup that preceded the war, Operation Desert Shield, were the first large-scale military operations undertaken since the Vietnam War. This new war footing allowed FVAP to initiate an innovative use of fax technology to facilitate voting.²⁹⁵ Specifically, FVAP provided for a centralized data collection and transmission program for faxed ballots.²⁹⁶ This Electronic Transmission Service (“ETS”) served as a broker between the local election official (“LEO”) and the voter. LEOs faxed voting information—ballots and other election information—to the ETS, and the ETS then transmitted that information to the voter.²⁹⁷ With cast ballots, the process was reversed.²⁹⁸ Having a process centralized through the ETS created several important benefits. First, the ETS was a one-stop shop, since voters and LEOs only needed to know one fax number to transmit election materials.²⁹⁹ Second, the ETS operated twenty-four hours a day, receiving ballots securely and then retransmitting them to the voter or LEO at specific times.³⁰⁰ This kept LEOs from receiving ballots in an unsecured manner, which was important since secrecy was one of the key victims of voting by facsimile.

During the two months that the system operated in 1990, 1,675 voters took advantage of the fax system.³⁰¹ In 2004, many more took advantage of the fax system to request ballots.³⁰² With the large number of troops abroad, the ETS processed 46,614 faxes for the forty-four states that allowed the FPCA to be faxed.³⁰³ This

295. Ralph C. Keikkila, *The Electronic Transmission of Election Materials*, in 12 INNOVATIONS IN ELECTION ADMINISTRATION 1, 1 (Federal Election Commission, No. 12, 1995).

296. See FED. VOTING ASSISTANCE PROGRAM, DEP’T OF DEF., 2006-07 VOTING ASSISTANCE GUIDE app. B (last updated Feb. 3, 2006), available at http://www.fvap.gov/pubs/vag/pdfvag/appendix_b.pdf (providing central number for UOCAVA voters to fax voting material).

297. See, e.g., Auditor’s Instructions: Absentee Ballot Email or Fax Transmissions To and From UOCAVA Voters 1-2, http://www.sos.state.ia.us/pdfs/elections/auditors/UOCAVA_Instruct.pdf (last visited Apr. 5, 2007) (instructing Iowa LEOs on how to fax material to FVAP transmission center and that FVAP center will return fax of voter’s application and ballot).

298. *Id.* at 2.

299. See FED. VOTING ASSISTANCE PROGRAM, *supra* note 296, app. B at 455.

300. See FED. VOTING ASSISTANCE PROGRAM, ELECTRONIC TRANSMISSION SERVICE MANUAL, INSTRUCTION TO LOCAL ELECTION OFFICIALS 8 (2006), available at <http://www.fvap.gov/leo/etsinstructforleos.pdf> (stating that the ETS accepts faxes and emails twenty-four hours per day and seven days per week.)

301. See Keikkila, *supra* note 295.

302. See Stewart, *supra* note 25, at 19.

303. *Id.*

included 38,194 post card applications from military voters for ballots and 1,844 blank ballots sent from LEOs to voters.³⁰⁴ Only 879 voted ballots, however, were faxed to election officials through the ETS.³⁰⁵ These numbers concerning the fax system point out two sets of limitations to this system. First, as reflected by the low number of voted ballots sent through the ETS, voters believe the system is not private; their vote is being cast in the open and can be seen by the person receiving the ballot in the LEO office.³⁰⁶ The voter must choose between having a public ballot cast and not casting a ballot at all. The second, and more critical, limitation is the issue of local adoption and utilization of the system as shown by how few ballots were faxed through the system. While it is difficult to tell how many ballots were faxed directly from LEOs to overseas voters, the very low percentage of LEOs using the centralized ETS for returning blank ballots to voters likely indicates that LEOs are still using the mail as a means of sending out the ballot.³⁰⁷ Reasons for this low LEO usage rate could include varying LEO ability to adopt and utilize the new technologies (i.e. facsimile machines), LEO staff knowledge of how to operate the system, or lack of secure locations to place the machine and the cast ballots so that ballots are not received or stored in an inappropriate environment.

Lack of secrecy is one of the main problems with transmitting ballots by facsimile, as it is difficult to separate the identity of the voter from the ballot, and the information is transmitted through a third party.³⁰⁸ One example of how such issues play out is California's attempt to deal with the secrecy issue. California requires overseas voters who are allowed to vote by facsimile³⁰⁹ to also sign a waiver of secrecy that states as follows:

I, _____, acknowledge that by returning my voted ballot by facsimile transmission I have waived my right to have my ballot kept secret. Nevertheless, I understand that, as with any absent voter, my signature, whether on this oath of voter form or my identification envelope, will be permanently separated from my

304. *See id.*

305. *Id.*

306. *Id.*

307. *See id.* (noting that military voters sent 38,194 FPCAs through the ETS central facsimile system but that LEOs only faxed 1,844 blank ballots via the ETS).

308. *See id.* at 19 n.1.

309. *See* CAL. ELEC. CODE § 3103.5 (West 2004) ("A special absentee voter who is temporarily living outside of the territorial limits of the United States or the District of Columbia may return his or her ballot by facsimile transmission.").

voted ballot to maintain its secrecy at the outset of the tabulation process and thereafter.³¹⁰

This waiver was initially deemed to violate the California Constitution's provision that all voting should be in secret.³¹¹ Subsequently, the California Court of Appeal reversed and made the following highly salient observation:

In our view, given a choice between fax voting and not voting at all, citizens should be able to choose to vote by fax and to waive their right to a secret ballot. In such circumstances, voting by fax is a "reasonable measure . . . to facilitate and increase exercise of the right to vote."³¹²

This view seems to be gaining popularity among states. According to the Election Assistance Commission, twenty-one states and the District of Columbia allow for the return of ballots by facsimile.³¹³ Military voters send ballots through the centralized FVAP program and sign a waiver similar to California's, which states: "I understand that by faxing my voted ballot I am voluntarily waiving my right to a secret ballot."³¹⁴

Federal courts have had limited review of voting by facsimile, but those that have addressed the issue have expressed contradictory views. In the two recent cases brought by the DOJ to enforce UOCAVA protections in Georgia and Pennsylvania, the courts each took a different tactic. The Pennsylvania district court highlighted many of the concerns with voting by facsimile, and described fax and electronic mail voting as "problematic" as these methods "are not legislatively sanctioned, are incapable of implementation by all counties, and they deprive voters of the right of secrecy."³¹⁵

In contrast, the Georgia district court specifically ordered that ballots be accepted by facsimile and proscribed a specific procedure for doing so:

The Georgia Secretary of State and the registrars of Georgia's 159 counties are given the authority to send requested ballots to

310. *See id.*

311. *See* *Bridgeman v. McPherson*, 45 Cal. Rptr. 3d 813, 820 (Cal. Ct. App. 2006).

312. *Id.* at 819 (quoting *Peterson v. San Diego*, 34 Cal. 3d 225 (1983)).

313. *See supra* tbl.2; *see also* FED. VOTING ASSISTANCE PROGRAM, U.S. DEP'T OF DEF., 2006-07 VOTING ASSISTANCE GUIDE Ch. 3: State Absentee Registration and Voting Procedures: Alabama to Wyoming, *available at* <http://www.fvap.gov/pubs/vag/vagchapter3.html> [hereinafter FVAP Ch. 3].

314. FED. VOTING ASSISTANCE PROGRAM, *supra* note 296, at 455.

315. *United States v. Commonwealth*, No. 1:CV-04-830, 2004 WL 2384999, at *6 (M.D. Penn. Oct. 20, 2004).

voters by facsimile transmission or email and to accept the returned of voter oaths and voted ballots to a single secure facsimile machine that is under the supervision of the Secretary of State. The Secretary shall promptly place each ballot received via facsimile in a sealed unmarked envelope and place that envelope within a second envelope containing the voter's oath. The Secretary shall then immediately transmit the ballots by overnight or personal delivery to the election superintendent in the appropriate county for verification and counting with all other absentee ballots. Transmission of returned voted ballots under this order may be made directly from the voter via facsimile, or may originate as image files sent via electronic mail to the Federal Voting Assistance Program's read-only computer facilities and then relayed to the Secretary via facsimile. In duplicating the received facsimiles of the ballots for purposes of permitting those ballots to be read by the appropriate counting equipment, the county election officials shall use the duplication of ballot procedures and the vote review panel as described in state law in order to assure the integrity of the ballot duplication process.³¹⁶

These cases highlight the fact that facsimile voting is gaining acceptance as a means of resolving ballot transmission time problems for overseas voters but still faces some reservations or outright opposition because of its lack of secrecy. As has been seen in other areas, there is a patchwork of state laws concerning the acceptance of facsimile ballots,³¹⁷ which could be resolved by stronger and more direct congressional measures. The combination of this variation and the lack of security means that facsimile voting still has to make significant progress for it to be accepted as the solution to the problems associated with overseas voting.

B. Internet Voting

In contrast to the security problems faced by facsimile voting, Internet voting, both directly over the Internet and through transmission of ballots over email, offers at least the hope of instantaneous electronic transmission, security, and secrecy. In practice, however, it has not proven to fulfill this potential. In keeping with its role as an innovator, FVAP has promoted projects to test the effectiveness of both email and Internet voting for the UOCAVA population. The first Internet voting project that FVAP promoted

316. Order, *United States v. State*, Section A (N.D. Ga. July 15, 2004) (No. 1:04-CV-2040), available at http://www.usdoj.gov/crt/voting/litigation/ga_uocava.htm.

317. See *supra* tbl.2.

was the Voting Over the Internet (“VOI”) pilot project, which sought to test the feasibility of remote registration and voting over the Internet.³¹⁸ VOI was a proof of concept design to ascertain whether secure and accessible Internet voting could be deployed for FVAP clients.³¹⁹ The project was a cooperative effort between federal, state, and local governments with FVAP acting as the Program Manager. Four states (Florida, South Carolina, Texas, and Utah) and four specific counties (Okaloosa and Orange Counties in Florida, Dallas County in Texas, and Weber County in Utah³²⁰) agreed to participate in the program for the November 2000 presidential election.³²¹ The pilot project identified 127 potential participants, ninety-one of whom registered and eighty-four of whom voted over the system.³²²

The system issues digital certificates and passwords to potential voters who can then log onto the FVAP server. The voter then:

selects the voting residence from the drop-down menu, and requests to vote (i.e., requests a blank E-Ballot). The VOI System logs the date and time the E-Ballot request is made. The citizen receives the E-Ballot, votes it, and submits the encrypted, voted E-Ballot after signing it using the digital certificate and password. The FVAP server “postmarks” the E-Ballot and forwards it to the appropriate LEO server. The LEO server issues an immediate message to the citizen acknowledging that the E-Ballot has been received. If the citizen has any questions about the status of the voted E-Ballot at any time, he/she can access the Check Status feature. The LEOs set their individually determined parameters to specify when to stop providing blank E-Ballots. That date and time are based on the deadline mandated by state election law.³²³

318. See generally R. MICHAEL ALVAREZ & THAD E. HALL, POINT, CLICK AND VOTE: THE FUTURE OF INTERNET VOTING (2004) (discussing the problems associated with UOCAVA voting in detail, as well as the VOI project).

319. FED. VOTING ASSISTANCE PROGRAM, DEP’T OF DEF., VOTING OVER THE INTERNET PILOT PROJECT ASSESSMENT REPORT ES-1 (2001), available at <http://www.fvap.gov/services/voireport.pdf> [hereinafter DEFENSE, VOI REPORT].

320. The importance to some state governments of UOCAVA procedures that are technologically-focused can be seen in the case of Utah. Utah enacted legislation stating: “Notwithstanding any other provisions of this title, any county may, if selected by the Department of Defense, participate in the Federal Voting Assistance Program pilot project to allow military and voters overseas as defined by Section 20A-3-403 to register to vote and cast their votes electronically.” UTAH CODE ANN. § 20A-6-103 (2006). Without such legislative permission, counties and LEOs cannot engage in experiments of this type.

321. See DEFENSE, VOI REPORT, *supra* note 319, at ES-1.

322. *Id.* at 2-2.

323. *Id.* at 3-5.

From the LEO side, processing is done in a similar manner:

To process E-Ballots, the LEO logs on to the LEO server and views the Ballot Reconciliation Table, reconciles the E-Ballots and validates them using the same criteria as the by-mail process. If any ballots are invalidated, the LEO can enter a reason. A handwritten signature comparison does not need to be performed because the citizen has already been authenticated by the FVAP server. The encrypted E-Ballots remain stored in the LEO server database.³²⁴

The stated goal of the VOI project was to mirror the process used for paper, mail-in absentee ballots to the greatest degree possible while still maintaining proper security.³²⁵

VOI was also designed to address each problem associated with the UOCAVA voting process. It had a voter registration component to facilitate voters completing the first step in the voting process successfully.³²⁶ Voters requested a ballot online and could check the status of their registration and ballot request, thus making any voter error in the process known quickly.³²⁷ The Internet also solved the problems associated with ballot transit, as all communication occurs almost instantaneously over the Internet.³²⁸ Also, because voters were using an electronic voting platform, it was possible to design a voting system that was more accurate and effective than the absentee voting technologies.³²⁹ Problems associated with ballot rejection could also be minimized because the LEOs designed their own ballots within the system to meet the requirements of their individual jurisdictions.³³⁰

The VOI pilot project's assessment report reached three basic conclusions. First, the technology worked; there were no major problems with the VOI system.³³¹ Second, within the scope of the pilot project, the risks introduced into the remote registration and voting process by technology could be mitigated and the integrity of the electoral process could be maintained.³³² The report also noted that the Internet voting system had the potential to enhance

324. *Id.* at 3-6.

325. *Id.* at 3-5.

326. *Id.* at 3-1 to 3-2.

327. *See id.* at 3-2.

328. *Id.* at 4-16 to 4-18.

329. *See id.* at 6-12 to 6-13.

330. *See id.* at 1-5.

331. *See id.* at 4-1 to 4-33.

332. *See id.* at 4-2.

the accessibility of the electoral process for UOCAVA citizens.³³³ Third, the VOI pilot showed that FVAP could collaborate successfully with state and local election officials in the development and implementation of an Internet voting system.³³⁴ Because FVAP relied on these state and local officials to carry out the provisions of UOCAVA, the success of this collaboration was a critical element and a harbinger of the possibility of successful collaborations in the future. Ultimately, however, the assessment concluded that the system was not sufficiently “mature,” and that further development was needed for “Internet remote registration and voting [to] be provided effectively, reliably, and securely on a large scale.”³³⁵

A scaled-up Internet voting experiment in 2004 was planned as another step towards such further development. The Secure Electronic Registration and Voting Experiment (“SERVE”) would have been implemented in fifty counties in seven states across the country to serve the UOCAVA population, including up to an expected 100,000 votes in the 2004 primary and general election cycle.³³⁶ A report prepared by four computer scientists asked by the FVAP to review the system, however, raised concerns about the security of Internet voting and its vulnerability to cyber-attack and led the Department of Defense to cancel the experiment.³³⁷ It is therefore unclear whether the Internet will be a tool in the continuing effort to facilitate the franchise of military and overseas voters despite its promise.

C. Email Voting

Finally, FVAP has also encouraged localities to use email to facilitate the transfer of voting information and ballots under the 2002 NDAA mandate.³³⁸ For example, in the 2002 elections, twenty-two jurisdictions in Virginia engaged in pilot email absentee

333. *Id.* at ES-2, 4-12 to 4-28 (noting reduction in problems caused by inaccuracies or unclear data, reduction in ballot transit time, reduction in burdens caused by mobility, and benefits to centralization). For further discussion of the debate about Internet voting and accessibility, see generally R. Michael Alvarez & Jonathan Nagler, *The Likely Consequences of Internet Voting for Political Representation*, 34 LOY. L.A. L. REV. 1115 (2001).

334. See DEFENSE, VOI REPORT, *supra* note 319, at 4-10 to 4-11.

335. *Id.* at ES-2.

336. See DAVID JEFFERSON ET AL., A SECURITY ANALYSIS OF THE SECURE ELECTRONIC REGISTRATION AND VOTING EXPERIMENT (SERVE) 4 (2004), available at <http://www.servesecurityreport.org/paper.pdf> [hereinafter JEFFERSON ET AL., SERVE].

337. See *id.* at 16.

338. See FED. VOTING ASSISTANCE PROGRAM, *supra* note 296, app. B at 456.

voting efforts for UOCAVA citizens.³³⁹ Because of the events of September 11, 2001 and the resulting increase in military members overseas, Cameron Quinn, the Secretary of the Virginia State Board of Elections, declared an election emergency for all active-duty military voters deployed outside the United States.³⁴⁰ According to the statute:

The provisions of this section shall apply in the case of an emergency that will not allow sufficient time for the distribution and handling of absentee ballot applications and absentee ballots, in accordance with the procedures of this title, for qualified voters who are unable to vote in person because of the emergency. The Secretary of the State Board of Elections shall have the authority to designate alternative methods and procedures to handle such applications and ballots.³⁴¹

Under the emergency order, election boards were directed to email an absentee ballot—as the alternate method and procedure—to the email address that an eligible absentee voter had provided on her absentee ballot request.³⁴² The packet sent to the voter included the ballot, cover letter, and instructions, all of which were prepared by the State Board of Elections.³⁴³

How successful was this pilot? The fifteen voters who requested ballots, seven of whom returned ballots that were counted, reported that they found the program to be exciting.³⁴⁴ The primary problems that voters encountered included technical problems with downloading the ballot file, which was about 800 KB, while election administrators had to combat problems associated with illegible or incorrect email addresses.³⁴⁵ The other issue, of course, was low participation, which Virginia officials ascribed largely to a lack of competitive races on the ballot—incumbent Republican Senator

339. See VA. BD. OF ELECTIONS, REPORT: EMERGENCY EMAIL ABSENTEE VOTING & PILOT PROGRAMS (unpublished internal report) (on file with authors) [hereinafter VA. BD., REPORT].

340. Press Release, Va. Bd. of Elections, Virginia Announces Emergency Voting Procedures for Overseas Military Voters and Pilot Program for Other Uniformed and Overseas Voters (Sept. 6, 2002), available at http://www.sbe.state.va.us/cms/Absentee_Voting/Military_Overseas_Citizens/Press_Release.html [hereinafter Press Release].

341. VA. CODE ANN. § 24.2-713 (2002).

342. See Press Release, *supra* note 340.

343. See VA. BD., REPORT, *supra* note 339. The exception was Loudoun County, which prepared its own documents.

344. See *id.*

345. *Id.*

John Warner ran unopposed—and voters unaware of the pilot initiative.³⁴⁶

So while email ballot delivery is potentially promising, it has yet to be tested on a large scale and its potential therefore remains uncertain. Some states used email balloting in the 2006 election cycle, as we were conducting the research for this Article.³⁴⁷ Furthermore, while some methods of email ballot delivery suffer from many of the problems associated with fax ballot delivery (especially privacy and security), technologies for securing email and documents delivered via email are rapidly advancing (certainly for members of the Armed Forces).

VII. THE EVOLUTION OF MILITARY ABSENTEE VOTING AND A LOOK TO THE FUTURE

The concept of enfranchising military personnel has steadily evolved. It started with expanding military voting via absentee and remote polling places while soldiers were still on American soil, progressed to fully enfranchising overseas military personnel, and now seeks to facilitate voting to the highest degree possible within the constraints of state election regulations. Congress has the constitutional authority to regulate nearly all aspects of the mechanisms of voting in federal elections and has conditionally exercised that power in an effort to ensure military personnel, and other overseas voters, the greatest possible opportunity to receive and return absentee ballots without fully taking over the entire process.³⁴⁸ Through statutory action, Congress has created a central entity—the Federal Voting Assistance Program—that advocates for and facilitates voting by UOCAVA citizens.³⁴⁹ FVAP has

346. *Id.*

347. As of May 2006, ten states (North Dakota, South Carolina, Montana, Mississippi, Florida, Virginia, Wisconsin, Washington, Illinois, and Missouri) allowed some form of email balloting, according to information provided by the Federal Voting Assistance Program. See *States that Allow Emailing of Ballots*, VOTING INFORMATION NEWS (Fed. Voting Assistance Program, U.S. Dep't of Def., Washington, D.C.), May 2006, available at <http://www.fvap.gov/pubs/vin/html06vins/may06vin.html>. In August 2006, Iowa announced that it would also allow email ballot delivery and return. See Posting of Michael Alvarez to Election Updates, <http://electionupdates.caltech.edu/2006/08/iowas-overseas-military-to-use-email.html>. At the time we write this Article, there is little information available about how these email initiatives fared in the 2006 elections. See Ellen Nakashima, *E-Mail Voting Comes with Risks*, WASH. POST, Oct. 31, 2006, at A19 (noting that it is difficult to tell how many soldiers use email for voting but that “[a]necdotally, the number of military personnel voting by email appears limited”).

348. See *supra* Part III.

349. See *supra* Parts IV & V.

worked with the states to lower the procedural barriers to UOCAVA voting by encouraging states to create uniform laws that mandate easier ballot requests, a longer time to cast ballots, and a minimum number of days for ballot transit.³⁵⁰ Congress has yet to exercise its power to the fullest degree available to mandate that states comply with standardized election procedures, leading to continued problems for military voters in navigating the various state election laws. As shown above, the legal remedies that Congress has been willing to provide are often simply not enough to enable those living and fighting abroad the ability to receive a ballot and vote because of continuing difficulties related to ballot transit time. The advance towards fully realized enfranchisement is therefore incomplete, and there is still room for additional procedural innovations.

But the focus of enfranchising military voters is rapidly shifting from procedural improvements to technological innovations, as it avoids the highly intrusive steps that total federalization would entail. Clearly, technology provides a theoretical solution to the ballot transit time problem by minimizing the time that it can take for a military voter to request a ballot, receive a blank ballot, and return a voted ballot. Furthermore, with advances in technology, electronic balloting for military voters might make for a more accurate, accessible, private, and secure voting experience than military voters now face when they use paper ballot request forms or ballots, often sent through postal services that may not be highly secure or that fail to ensure privacy. But there simply have been too few serious attempts to develop, implement, and test new technologies for ballot delivery to military voters, and thus new technologies remain poorly tested and poorly developed, and may thus fall short of the requirements for full implementation for all military and overseas voters.

The key problem with technological innovation has not necessarily been with the technology itself but with issues raised by interest groups over aspects of trials of these technologies.³⁵¹ Concerns over security and secrecy have even hampered scaling up successful pilot initiatives into large-scale tests, let alone into operational pro-

350. See 42 U.S.C. § 1973ff-1(a)(2) (2006) (mandating that each state “accept and process, with respect to any election for Federal office, any otherwise valid voter registration application and absentee ballot application from an absent uniformed services voter or overseas voter, if the application is received by the appropriate State election official not less than 30 days before the election”).

351. See generally JEFFERSON ET AL., *SERVE*, *supra* note 336 (criticizing *SERVE*).

grams. Some of these concerns are based upon real issues associated with the use of new technologies for ballot delivery and receipt; some, no doubt, arise from the political uncertainty about the potential impact of thousands of new ballots received from heretofore disenfranchised military voters. Nonetheless, if the past is any indication, the ongoing deployment of a sizeable population of troops abroad will spur innovation and changes in the law to help facilitate military voting. Supporting military voters is both politically popular and normatively laudable, so there is room for procedural and technological progress aimed at enfranchising military and overseas voters. If Congress provides the statutory guidance and funding, and state and local election officials work constructively with federal officials, it is likely that a fully realized technological answer to the ongoing troubles in absentee voting could eventually be developed that alleviates most, if not all, of the difficulties faced by overseas and military voters. Congress has taken steps in the right direction with UOCAVA, HAVA, and the 2002 NDAA, but there is still work to do to adequately serve those who serve the country.

Indeed, the problems that arise when military personnel, their families, and other citizens overseas attempt to exercise their right to vote illustrate the limits of pure legal strategies designed to enfranchise voters by improving only procedural access to voting. The laws for UOCAVA voters—both federal and across the states and territories—vary in robustness but generally are designed to provide procedural access to the polls.³⁵² At the federal level, the UOCAVA statute, HAVA, and other legislation contain provisions intended to overcome informational limits, point of contact issues, and registration difficulties that afflict the UOCAVA populations. HAVA, for example, explicitly extends the length of validity of a UOCAVA voter's registration. Implicit in these legal reforms is the idea that the voter can meaningfully cast a ballot given the fact that they are enfranchised by various legal schemes.

Unfortunately, the problems of UOCAVA voting that have existed throughout the history of attempts to allow military personnel, their families, and other citizens overseas to vote (including those problems seen in recent elections) are certain to be seen in 2008. The reason for these continued problems is simple: the challenge of UOCAVA voting is one of technology as well as the law. The ballot transit issue that has stymied UOCAVA voting for 100

352. See FVAP Ch. 3, *supra* note 313.

years will continue to be a problem because mail service continues to have limits, especially given the multi-governmental aspect of international mail transport. Moreover, many states have begun to adopt so-called “voter-verification” requirements that state that any electronic ballot must produce a contemporaneous “audit trail” that can be used for auditing purposes.³⁵³ Although similar technologies have been used in Europe, allowing for electronic ballot voter verification, such systems are unlikely to be used or allowed in the U.S. 2008 elections.³⁵⁴

The politics of Internet and electronic voting play strongly in the debate over improving technological access to the vote for UOCAVA voters. In 2004, SERVE’s cancellation was in part predicated by the concern that the effort to enfranchise military voters was political; some perceived this project as the Department of Defense’s attempt to turn out Republican military votes. Similarly, the concern about vote tampering has brought greater scrutiny to efforts to allow military voters to cast ballots using facsimile technology. Such concerns are likely to surface again in 2008.

Furthermore, the political landscape of American politics is likely to keep UOCAVA voting issues at the center of debate. First, many observers of American politics note the highly polarized atmosphere that exists between “blue” and “red” states, and this political polarization is unlikely to wane following the recent partisan shift in congressional representation from Republicans to Democrats.³⁵⁵ Second, the 2008 presidential election is for an open presidential seat, and while as we write this Article the first primaries are still many months away, there are already at least a dozen candidates in each major party who have taken some step towards entering the 2008 race. The 2008 election promises to be a closely contested and expensive race, one where in the end, a few hundred votes in a critical state (like Florida in the 2000 election) might provide the difference between a Republican or Democratic Electoral College victory. Finally, while the exact Electoral College calculus is now uncertain, and will depend on the configuration of party nominees and their running mates, it is likely that

353. Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, 1793 (2005).

354. See ALVAREZ & HALL, *supra* note 318, at 142-46.

355. For a discussion of the polarization of American political life, see generally STANLEY B. GREENBERG, *THE TWO AMERICAS: OUR CURRENT POLITICAL DEADLOCK AND HOW TO BREAK IT* (St. Martin’s Press 2005) (2004); see also generally THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS? HOW CONSERVATIVES WON THE HEART OF AMERICA* (2004).

some of the most closely contested states may be those with large populations of military voters and dependents, or citizens who live overseas.³⁵⁶

Thus, the partisan divide among political elites, close presidential elections, and the Electoral College, all interact to make technological reforms that can enfranchise UOCAVA voters highly controversial. Moreover, the two resources needed for technological experimentation are sorely lacking at present. The first resource needed is money: developing technological solutions for the UOCAVA voting problem, and testing those solutions scientifically, will not be cheap. The Democratic takeover of Congress and the subsequent re-introduction of so-called “Pay-Go” budgeting rules, coupled with growing scrutiny over the budget of the Department of Defense, limits the likelihood that funds will be identified and earmarked to support technological improvements to the UOCAVA voting process.³⁵⁷ The second resource lacking is federal, state, and local election officials willing to work as “champions” of such reforms. Implementation of innovation typically requires having a champion who will work to address problems and overcome obstacles that arise in the first use of a technology. Even in the best political environment, such innovations require strong champions who can acquire resources, foster a positive legal environment (technology reforms often conflict with procedural legal requirements), and generate excitement needed to motivate actors to participate in new projects. Given the highly litigious and hostile environment that exists today with election reform, such champions are not likely to emerge, even though anecdotal evidence indicates that election officials are aware of, and concerned about, the problems facing UOCAVA voters.

Thus, as we look to the future, and to the steps that should be taken to ensure that UOCAVA voters have the same ability to cast a ballot, in a user-friendly, easy, accessible, verifiable, and secure manner—and to have the same assurance that voters who live in their voting jurisdictions have when they cast their ballots in person or remotely that their ballots are counted in a way consistent with their intent—we see that technology holds the key for en-

356. For example, Florida and New Mexico may again prove important in the Electoral College calculus in 2008, as may Colorado and other Mountain West states with military bases. For more on the Electoral College and these calculations, see DARON R. SHAW, *THE RACE TO 270: THE ELECTORAL COLLEGE AND THE CAMPAIGN STRATEGIES OF 2000 AND 2004* (2006).

357. See Lori Montgomery, *House Adopts Pay-As-You-Go Rules*, WASH. POST, Jan. 6, 2007, at A04.

franchising UOCAVA voters. This will require a research and development effort, and a long-term commitment by election officials at the federal, state, and local levels. A policy framework that provides resources for technology development and experimentation is needed, as well as the development of flexibility in UOCAVA voting policies and procedures that can allow for pilot testing and experimentation of new technological approaches to voting. For example, resources should be made available for jurisdictions to study, test, and implement technologies for the use of various forms of Internet-based ballot provision to UOCAVA voters—both through email and web-based systems; to what extent can providing the balloting materials to UOCAVA voters through the Internet, where they then print and return the ballot by traditional mail or fax, alleviate some if not all of the ballot transit time problem? What problems arise with Internet-based ballot provision, and do methods like this for ballot provision increase the usability, accuracy, and reliability of the voting process for UOCAVA voters? And if we can develop ballot provision systems that are shown by research to work well, can we then develop technologies that will resolve ballot return issues, again without sacrificing security, usability, accessibility, and accuracy?³⁵⁸ Only by undertaking pilot projects and experiments, studies that are backed by solid and scientific evaluation, can we learn exactly how technology can improve the UOCAVA voting experience, and thereby work to better enfranchise the millions of Americans who live and work overseas, including those who are stationed overseas in the Armed Forces.

Interestingly, in the long-term we may learn much about how to improve UOCAVA voting, with technology, as a by-product of the positive culture toward voting technology and innovation that now exists in Europe. Many European countries currently engage in Internet voting experiments, including the Estonia, France, the Netherlands, Switzerland, and the United Kingdom.³⁵⁹ Researchers throughout the world are closely studying these experiments and pilot projects, and we expect to learn much about both the technology and the behavioral effects of using these technologies for voting. These projects will increase the overall knowledge regarding what are the successful paths to Internet voting and similar

358. See ALVAREZ & HALL, *supra* note 318, ch. 8, for a complete discussion of proposals aimed at developing a research and development effort, with strong, science-based evaluation, of Internet-based approaches for voting systems.

359. See *id.* at 142-46 for a discussion of these pilots.

efforts to use technology to enfranchise voters. Although this knowledge will not benefit UOCAVA voters in 2008, it is likely to create the basis for future experiments in the United States with Internet and remote voting for UOCAVA voters.